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No. 17377

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JOHN ARTHUR LUOMOLA,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

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No. 17377
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APPELLEE'S BRIEF.

I.
JURISDICTIONAL STATEMENT.

The Government incorporates herein appellant's jurisdictional statement as set forth in his Brief on Behalf of Appellant¹ at pages 1 and 2.

II.
STATEMENT OF THE CASE.

Appellant was found guilty after trial by jury of the illegal importation of marihuana.

The appeal is concerned with the nature and effect of certain remarks made by the prosecutor in his closing argument to the jury and with the Court's refusal on the date set for sentencing and judgment to postpone said sentencing in order that a new attorney al-

¹Hereinafter referred to as App. Br.

legedly retained by the appellant might present certain information or make certain motions to the Court.

It should be noted that as these are the only issues under consideration and as no objection is raised based on the sufficiency of the evidence, or the commission of error during the trial, it is deemed unnecessary to present any exhaustive statement of the facts.²

In considering the appellant's statement of the case (App. Br. 2-3), the appellee must take exception to certain language employed in said statement. The prosecutor did not make "certain remarks which implied to the jury that appellant had trafficked in narcotics or marihuana on prior occasions" (App. Br. 2) nor were the prosecutor's comments "prejudicial statements" as stated therein (*ibid.*). An analysis of the prosecutor's remarks as presented in our Argument (IV *infra*, indicates that there was no such implication made—the remarks were merely fair comment in response to an argument made by counsel for the appellant and the prosecutor stated that he had no evidence that the appellant had ever "smuggled before" and that he didn't mean to suggest "that he had such evidence."³

²In this connection it should be noted that the Reporter's Transcript of Proceedings on appeal (hereinafter referred to as R. T.) includes only the arguments of counsel before the jury. The remaining pertinent portion of the proceedings which concerns the occurrences on the date of sentencing is before this Court as Exhibit A, 29-37 (annexed to App. Br.).

³The portion of appellant's argument to which the prosecutor responded is set forth in R. T. 8-10, the response is at pp. 13-14 *ibid.* and note particularly the statement by the Court that the prosecution was within its rights in commenting since the defense had "opened up" the subject in its argument (*ibid.* 14).

III.

QUESTIONS PRESENTED.

1. Were the remarks of the prosecutor in his closing argument of such a prejudicial nature as to call for a mistrial?

2. Was it mandatory that the trial court postpone sentencing and judgment on the date set therefor and to grant a continuance to the appellant on his representation, made for the first time on that date, that he had retained new counsel who would present certain "motions" to the Court?

IV.
ARGUMENT.

A. The Prosecutor's Remarks in His Closing Argument Did Not Constitute Prejudicial Misconduct.

The prosecutor's remarks [R. T. 13, 14] to which the appellant objects were properly made in response to one of the appellant's arguments. In order to understand why the prosecutor's remarks were necessary and proper one must first read the argument made by the appellant, particularly that portion [R. T. 8-10] which implies that smugglers have a certain set way of behaving and that because appellant's behavior pattern was a little unorthodox, it should make the inference that the appellant could not be a smuggler. In response, the prosecutor merely suggested that smugglers did not have any set pattern and that each case should be decided on its own facts [R. T. 13].

The cases are legion in support of the proposition that fair comment on an argument "opened up" by the defense is proper and that in many cases this "invited" argument is proper even though it might be improper if made in the first instance by the prosecution.

An important case in point in this circuit is *Schino v. United States*, 209 F. 2d 67, 71, 72 (1953), *cert. denied* 347 U. S. 937, in which this Court stated with reference to a criticized argument of Government counsel:

"It was made in reply to the argument of Schino counsel, in which he tried to picture Schino as an officer of the Bureau who was doing his duty and who was not involved in any wrongdoing and thus invited a rebuttal argument of this nature. An

argument to the jury which is based upon the evidence or upon reasonable inferences therefrom, or *which even though otherwise improper, is in reply to such an argument* as made by Schino's counsel as proper. *Ocha v. United States*, 9 Cir., 167 F. 2d 341, *Springer v. United States*, 9 Cir., 148 F. 2d 411, 414." (Emphasis supplied.)

A statement to similar effect appears in *United States v. Achilli*, 234 F. 2d 797, 802 (7th Cir. 1956), *affd.* 353 U. S. 373 (1957), where the Court in concluding that Government counsel's argument, when considered as a whole, represented nothing more than zealous advocacy and did not require a reversal, stated:

"... As we said in *United States v. Doyle*, No. 11528, 7 Cir., 234 F. 2d 788, 796, quoting from *Malone v. United States* 7 Cir., 94 F. 2d 281, 288, *certiorari denied* 304 U. S. 567, 58 S. Ct. 944, 82 L. Ed. 521, "'Counsel has a right to make any argument based upon evidence proven in the case, or which may be reasonably inferred therefrom *and to make reply to that made by opposing counsel*, and in doing so, statements may be made which otherwise would be improper ...'" (Emphasis supplied.)

Many other cases which have considered the problem of "invited argument" have employed language similar in vein to that in the *Schino* and *Achilli* cases, *supra*, and have held that considerable latitude is allowed to counsel in meeting the arguments of opposing counsel.

See:

Brennan v. United States, 240 F. 2d 253, 263 (8th Cir. 1957);

Ochoa v. United States, 167 F. 2d 341, 344
(9th Cir. 1948);

Springer v. United States, 148 F. 2d 411, 414
(9th Cir. 1945);

Schmidt v. United States, 237 F. 2d 542, 543,
544 (8th Cir. 1956);⁴

Green v. United States, 282 F. 2d 388 (9th
Cir. 1960).

It is submitted that an examination of the cases and authorities cited by the appellant (App. Br. 5, 6, 8) indicate that none are in point or bear any relation to the circumstances concerned in the instant case.

Michaelson v. United States, 335 U. S. 469 (1948), cited by the appellant (App. Br. 5) and the Wigmore and McCormick references (App. Br. 6) are concerned with the introduction of evidence and stand for the proposition that evidence of the bad character of an accused cannot be introduced unless the defense first attempts to introduce evidence of good character. Here we have no attempt to introduce evidence of any bad character—as a matter of fact, at two separate stages of his argument, one before and one after the defense objection—the prosecutor stated that there was no evidence that he did ever smuggle before.⁵

⁴The Court in *Schmidt* employed the following language:

“... and therefore the criticized argument of the Government’s counsel was provoked and invited, and hence, in the circumstances was not improper [citing cases].”

⁵See R. T. 13, “We don’t have any reason, any evidence, that indicates that he has, before you. You are only concerned with the offense charged, with the one count he is charged with in this particular case”; and then after the objection at 14, “Well, in fairness to the defendant, I have no evidence that he has smuggled before. I didn’t mean to suggest that I had. I was only

We can, of course, find no fault with the language in *Berger v. United States*, 295 U. S. 78 (1935), quoted at Appellant's Brief pages 6 and 7, but it is submitted that the remarks of counsel which are complained of here bear little parallel to the conduct of the prosecutor in *Berger*, which the Supreme Court found to be "pronounced and persistent, with a probable cumulative effect upon the jury which cannot be disregarded as inconsequential" (*Berger, supra*, 89).⁶

Similarly with the other cases cited by the appellant (App. Br. 8). In *Leonard v. United States*, 277 F. 2d 834 (9th Cir. 1960), the prosecutor, in his opening statement, spoke of 83 other crimes which he could prove the defendant committed, in addition to the one with which defendant was charged and a blackboard on which the alleged crimes were detailed was kept in view of the jury throughout the trial.

In *Nalls v. United States*, 240 F. 2d 707, 709, 710 (5th Cir. 1957), the prosecutor stated to the Court in the presence of the jury that there were three witnesses who had been subpoenaed, but the Government would not put them on because their testimony would be cumulative.

In *Hanford v. United States*, 249 F. 2d 295 (5th Cir. 1957); which concerned a few bottles of untaxed

commenting on his comments on what standard smugglers and standard conduct of smugglers may be or may not be: I am suggesting they are all different and have to be decided on their own facts."

⁶For a general idea of the tactics censured in *Berger*, see pp. 84 and 85 of the Opinion. The Court discusses misstatement of facts in cross-examination, bullying and arguing with witnesses, assuming prejudicial facts not in evidence, insinuations and undignified and intemperate argument to the jury, etc., certainly not by any stretch of the imagination can it be said that this resembles the conduct of the prosecutor in this case.

liquor, the impression was sought to be conveyed that because of this, the defendant was in some manner responsible for the fact that too many of the prosecutor's friends and friends' children get run over on the highways (*Handford, supra*, 298).

In *Ginsberg v. United States*, 275 F. 2d 950 (5th Cir. 1958), the prosecutor argued that though none had testified during the trial, the evidence of 50 other witnesses were available to contradict the four witnesses who had testified to the defendant's good character.

It is submitted that all of these cases cited by the appellant concern insinuations that certain damaging evidence was available which could be used against a defendant and that they, therefore, bear little relationship to this case where government counsel introduced all the evidence which was available to him and stated that he had no further damaging evidence to offer other than that which had been introduced at the trial.

In the remaining case which the appellant cites, that of *Chavez v. United States*, 275 F. 2d 813 (9th Cir. 1960), App. Br. 8, the judgment of conviction was reversed because of insufficient evidence; there was also dicta to the effect that some of the evidence had been improperly introduced and the case is therefore not in point in here where the evidence was sufficient for conviction and where no improper evidence was introduced.

It is submitted, therefore, that because the prosecution was simply commenting on a matter "opened up" and invited by the defense, and was attempting merely to negate the inference sought to be conveyed to the jury that the appellant was not guilty of smuggling

because he did not look and act as a smuggler should, its remarks were proper in their context and the trial court ruled correctly in overruling the defense's objection to them [T. R. 13, 14].

B. The Trial Court Committed No Error in Refusing to Grant a Continuance to the Appellant, Prior to Judgment and Sentencing.

It should be noted that appellant was found guilty on December 21, 1960, Transcript of Record on Appeal,⁷ page 17; and that the case was referred to the Probation Officer for a pre-sentence report and continued until January 16, 1961 for hearing, report, sentence, and ruling on motions [T. R. 16]. There is no evidence in the record before this Court that during the time which intervened either the Court or the Court appointed counsel which had represented him ably during the trial had ever been put on notice that the appellant had retained a new counsel to represent him in connection with proceedings subsequent to trial.⁸

It should be noted also that appellant's court appointed counsel had moved for a new trial on December 27, 1960 [T. R. 18], and that the matter was heard and decided on January 16, 1961 [T. R. 22, 25], and that at no time had any newly retained counsel appeared, co-operated or served notice of his retention to the Court.

In the circumstances, the Court acted properly and within its sound judicial discretion in refusing a continuance and proceeding to pronounce judgment.

⁷Hereinafter referred to as T. R.

⁸Mr. Sheela, the Court appointed counsel, stated to the Court on January 16, 1961, ". . . 'this is the first time I knew he had retained an attorney at this point'" [App. Br., Ex. A, p. 30].

The appellant has cited no authority to the contrary. The cases cited by the appellant (App. Br. 9, 10) all concern the right of the accused to counsel during every stage of a criminal proceeding and it submitted that appellant was at all times so represented, even during the proceedings on January 16, 1961.

The record indicates that the Court further protected the appellant by declining to relieve his court appointed counsel and by requesting counsel on its own motion to investigate as to whether appellant had retained other counsel and to make any further proper motions if necessary [R. T. 25]. The Court also called the attention of the appellant and his counsel to the fact that if anything developed later on, the judgment could be vacated (App. Br. Ex. A, p. 30).

It is apparent therefore that the Court's decision to enter the judgment on the day set therefore in no conceivable way was to the appellant's prejudice.

V.

CONCLUSION.

There was no reversible error connected with any of the proceedings incident to appellant's trial and judgment and his conviction should therefore be affirmed.

Respectfully submitted,

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No. 17382 ✓

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FOR THE NINTH CIRCUIT

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IRVING GOLDHEIMER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Apellee.

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APPELLANT'S OPENING BRIEF

--

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APPELLANT'S OPENING BRIEF

STATEMENT OF PLEADINGS AND
FACTS DISCLOSING JURISDICTION

Defendant Irving Goldheimer, together with Defendants Eugene Duvalcourt Walker, Bryce Wilson, Nicolas Rodriquez Medina, and Francisco Ochoa Mendez, were charged in an Indictment with a violation of 21 U.S.C. (1) 174, 176(a), conspiracy to import heroin and marihuana.

Goldheimer was charged in Count One with conspiracy

(1) The record consists of the Clerk's Transcript, the Reporter's Transcript in three volumes, and the exhibits, table of which, pursuant to Rule 18(f) of this Court is set out hereinafter as Appendix "A", together with motion for new trial and the minutes of the Court, including motions for judgment of acquittal as to Goldheimer, and other matters.

to violate 21 U.S.C. 174. Reference to the Indictment is hereby made, which Indictment, in substance, charged they conspired to receive, conceal, transport and facilitate the concealment and transportation, and sell and facilitate the sale of heroin, a narcotic drug.

Count Two of the Indictment charged Walker, Goldheimer, Wilson, Medina and Mendez with knowingly conspiring to receive, conceal, transport and facilitate the sale of marihuana, which, as the defendants would then and there well know, would have been imported into the United States of America contrary to law, and to wilfully smuggle and clandestinely introduce into the United States from Mexico, marihuana, with intent to defraud the United States, in violation of U. S. C. Title 21, Section 176.

To the Indictment the defendants Walker and Goldheimer entered pleas of not guilty and proceeded to trial before the Court, sitting with a jury. The other defendants named in the Indictment, so far as is known to this appellant, were never apprehended or brought to trial. The Trial Court had jurisdiction under 18 U.S.C. 3231.

The jury found Defendant Goldheimer guilty of both counts; the judgment was twenty (20) years on Counts One and Two, both to run concurrently, a total of twenty (20) years.

This Court has jurisdiction of the appeal under 28 U.S.C. 1291.

Judgment for Goldheimer was filed November 28, 1960, as appears from the certified transcript of the record by the Clerk. Notice of Appeal for Goldheimer was timely filed December 1, 1960, as appears from the certified transcript of the record by the District Clerk, and a Request For and Designation of the Record and Proceedings to be contained in the record on appeal, and statement of points upon which the Appellant Goldheimer intends to rely upon appeal, was filed December 1, 1960, as appears from the Transcript of the Record filed by the Clerk.

STATEMENT OF THE CASE
FACTS PERTINENT TO THE APPEAL

Count One charges the crime of conspiracy. Count One stated, in brief, that the Appellants Walker and Goldheimer, together with the other defendants named therein, conspired to knowingly and unlawfully receive, conceal, transport and facilitate the concealment and transportation, and sell and facilitate the sale of heroin, a narcotic drug, which, as the defendants would then and there well know, would have been imported into the United States of America contrary to U.S.C., Title 21, Section 174, and clandestinely introduce into the United States from Mexico, heroin, with intent to defraud the United States, which merchandise should have been invoiced prior to importation into the United States, in violation of U.S.C., Title 21, Section 174.

Count Two charged Walker, Goldheimer, and the other defendants, with having conspired to knowingly and unlawfully receive, conceal, transport and facilitate the concealment and transportation, and sell and facilitate the sale of marihuana, in violation of U.S.C. Title 21, Section 176.

Various overt acts are alleged in both Counts One and Two.

EVIDENCE ON THE MERITS AT THE TRIAL

Summarized, the pertinent evidence to the appeal is as follows:

PROSECUTION

JAMES RALPH WEBSTER testified that while he was in jail in Long Beach he met the defendant-appellant Goldheimer (RT 4,5); Webster stated that while he was in the jail from time to time he had "small bits of conversation here and there" with Goldheimer (RT 8,9). During the course of their conversations, Webster stated Goldheimer told him he had been to Mexico and that he had some narcotics sources in Mexico (RT 12,13); that he intended to go down to Mexico again; that he had a friend who had a boat, and they were intending to import a large quantity of marihuana (RT 13,14). Webster stated he was in jail for carrying a concealed weapon and possession of a dangerous drug (RT 15); some time in May or June he met Donald Wilets (RT 15); he met Agent Wilets in a drive-in at Manchester and Figueroa (RT 17), where he had a conversation with

Wilets and outlined to him the general conversations he had had with Goldheimer (RT 17). He went to Baja California with Wilets and told him he had met a man who said he had a source of supply of narcotics in Mexico (RT 18, 19). About June 23, 1960, he met Goldheimer and Walker at a restaurant in North Long Beach (RT 19); they talked about the boat and later they went to Newport Beach where the boat was berthed and they looked at the boat (RT 24,25). They looked at the chart room and some charts of the Mexican area below Ensenada. Walker said it was his intention to have the shipment wrapped in water-proofed packages, compressed, and put into sail bags; they are put on deck when a ship is at sea (RT 25,26). Goldheimer said he was short of money; he had some money in Mexico; and the witness was to get some money together. In the interim he reported to Agent Wilets (RT 28).

The witness stated he told Goldheimer he wanted them to meet his financial backer (RT 29,30); he planned to meet Goldheimer July 13, 1960, and he met Goldheimer at the Scandia Restaurant, at which time he had Mr. Wilets with him; he and Wilets had a drink and waited for the arrival of Goldheimer

(RT 30,31); Goldheimer appeared, but Walker was not available; he told Goldheimer Wilets was a big man in the narcotics business and could be a financial backer (RT 31,32). On July 14, 1960, together with Agent Wilets, he met Goldheimer and Walker at the Palms Bar (RT 33); he could not remember what Goldheimer said, but what Walker said; Walker looked at Wilets and asked Webster if Wilets was all right; he replied he was (RT 34); Walker asked if Wilets was going to put up any "front money" (RT 34,35). He met Goldheimer July 28, 1960; asked Goldheimer if he was ready to go to Mexico; Goldheimer said he would be ready the following morning, but that he was short of cash; he couldn't get it (RT 36).

The witness testified Goldheimer asked him if he would make all the arrangements, get the tickets, etc. (RT 36). He met Wilets the next day at the CMA Airlines Office and arranged for two tourists cards for himself and Goldheimer to Guadalajara and two tickets from Los Angeles to Guadalajara (RT 36,37). On July 29, 1960, he met Mr. Wilets, who picked him up in downtown Los Angeles; they then picked up Goldheimer and went to the airport (RT 37); on the way to the airport they

said they would try their darndest to bring the matter to a head, get a clean commitment; they went to the airport; he and Goldheimer boarded the plane and they flew to Guadalajara by way of Mazatlan (RT 37, 38).

The witness stated that Mr. Goldheimer and Wilson returned from Puerto Vallarta and the following day they all went to the Guadalajara State Prison (RT 43, 44); there they saw Bonifacio Talaveras; at the prison they talked about marihuana and how much was available (RT 45,46). While in the prison, the witness said they were dealing marihuana out of a prison cell; they also talked about the manufacture of heroin (RT 47,48). While in the prison, Talaveras sent a man out, who returned later and stated there was some heroin available in about a week; there was a discussion about the price (RT 49,50). In a day or so they returned to the prison, that is, Wilson, Goldheimer and the witness, and the witness said that he stated \$10,000.00 was an acceptable price for a kilogram of hereoin, and he wanted to know when delivery could be made (RT 52,53). The witness stated he, in fact, purchased the ticket, which cost \$137.00, from Los Angeles to Guadalajara, but that Goldheimer had given him \$100.00 of the money, stating he was short (RT 60,61).

On August 4, 1960, he and Goldheimer returned to Los Angeles, where they were met at the airport by Agent Wilets (RT 62,63). On the way in to town, Goldheimer said they had made arrangements to return to Guadalajara on the 21st of August, where they could pick up heroin and marihuana, and that the price was \$10,000.00 American money (RT 63,64). Mr. Goldheimer said he could not go to Mexico on the 21st because he had some appearance in Court to look after, and it was understood that the witness and Wilets would return to Mexico (RT 65,66). The witness stated he went to Tijuana about August 18th with Agent Wilets, and from there he went to Guadalajara by himself. The witness went to Guadalajara, but failed to find Mr. Wilson, so he went to Puerto Vallarta, where he found Mr. and Mrs. Wilson (RT 67,68). He stated that Wilson told him he was unable to stay in Guadalajara, that he did not have the funds, and he was waiting for the heroin to be available, but Wilson returned with the witness to Guadalajara where they met Agent Chappell (RT 68,69). The witness, Wilson and Chappell then went to the penitentiary; they arranged to meet Mr. Medina, at which time there was present the witness, Wilson, and Chappell; they met in a bar in Guadalajara; the

witness, Wilson, Medina and Chappell discussed getting the heroin and discussed talking to a grower who grew the opium by the name of Ochoa Mendez. Some two days later they met Mendez in a hotel (RT 71,72). Arrangements were made to meet in another town; Mendez and Medina said they were not too sure that these men were not Federal Agents and they did not want to be hijacked (RT 74,75). They arranged to meet in a hotel and Mendez left the room and returned with a raffia-type shopping bag containing some article; Chappell looked at it and said it was opium; Chappell then had a small hand bag with his toilet articles from which he took a 38-caliber revolver and placed Medina and Mendez under arrest (RT 80,81).

On cross examination, Webster stated he had been in jail with Goldheimer; that while in jail Goldheimer gave him a telephone number at which he could be reached if Webster cared to call him; that was at the Normandie Village Apartments, in Los Angeles (RT 84). After he was released, he called Goldheimer and made an appointment with him; he suggested where they meet; when he met Goldheimer, he talked with him; after their first meeting, he again met Goldheimer a week or so later in the month of June, 1960. He met

Goldheimer in Court, in the Jergins Trust Building (RT 88,89). The witness stated he had been in Mexico several times, probably a dozen; he had studied Spanish there; he could speak Spanish fluently (RT 91, 92); he arranged the meeting between Wilets and Goldheimer at the Scandia Restaurant (RT 91-93); he actually went to the airport with Goldheimer after meeting Wilets, and he actually bought the tickets (RT 93, 94); he gave the CMA Clerk the names James R. Webster and Irving Goldheimer. He had about \$350 at that time which had been given to him by Agent Wilets (RT 94,95); Wilets had given him the \$300 prior to his meeting Goldheimer on that day. When they arrived at Guadalajara, he and Goldheimer had a double room (RT 97). While he was in Mexico and they met these various people concerning whom he had previously testified, he stated that Goldheimer neither spoke nor understood Spanish (RT 98,99). That after returning to Los Angeles, he did not meet Goldheimer for about two weeks (RT 100); he and Goldheimer met at the Pancake Restaurant, and from that time to his appearance in Court, he had not met him again. The witness admitted he had met Agent Wilets through Deputy Sheriff Berman, and that from the time of their

meeting he had had some six or seven hundred dollars from Wilets (RT 101, 102); the money was given to him in the Federal Building. He stated that prior to going to Mexico with Mr. Goldheimer, he had discussed with Mr. Wilets what they were to do in Mexico in connection with Mr. Goldheimer (RT 105,106). The witness stated he had been convicted of a felony, to wit, bank robbery, in three separate counts, and he was sentenced to ten years, to run concurrently, in Cases No. 29059 and No. 29005, United States District Court, Southern District of California, Central Division (RT 108). That at times he had been under psychiatric care; that at the time he pled guilty to bank robbery there was some question raised about his mental condition, and when he was sentenced to the penitentiary the Judge recommended he be given psychiatric care (RT 108). A document was marked Exhibit 4 and received in evidence, showing receipts by the witness Webster of about \$600 in the month of August, 1960 (RT 132). The witness Webster stated that he was a "fence"; he told this to Goldheimer; and that he received and sold stolen property (RT 136). Webster testified he had been to Mexico on another case with Agent Wilets (RT 141). The witness Webster testified that in connection with

the bank robberies which he had pled guilty to, he had obtained something in excess of \$10,000.00 (RT 160).

DONALD P. WILETS testified he was a Bureau of Narcotics Agent; that in June, 1960, on the 23rd, he was at the Pancake Restaurant and he saw Webster, Goldheimer and Mr. Walker. At about 10:00 p.m., these persons left the restaurant and entered a Volkswagen car (RT 162, 163); the agent testified that on July 13, 1960, he was at the Scandia Restaurant with Mr. Webster and the Defendant Goldheimer (RT 165); while at the restaurant he asked Goldheimer what his plans were for bringing back narcotics, and Goldheimer said he had a connection in Mexico and that the proposed plan to bring the marihuana back was to bring it from the vicinity of Guadalajara by truck up the coast to one of the ports, and there put the marihuana across the bay and then to the vicinity of Ensenada, where a boat would pick it up and bring it to the United States (RT 169-171). The Agent stated they talked about his financing Webster in the transaction, but this point was almost left in a nebulous stage; the thing he wanted was to have Goldheimer introduce Webster to a factory source for heroin (RT 172,173).

Agent Wilets said he stated to Goldheimer that he would like to see the marihuana at Ensenada and have two or three days with which to contact the buyers (RT 174, 175). The Agent stated that on July 14, 1960, he was at the Palms Bar with Webster and there saw Goldheimer and Walker; sometime after Walker and Goldheimer entered the bar, one of them suggested they leave; they walked outside the bar to a vehicle about 9:15 (RT 180); they went for a ride in the car, during which time he told Walker that he would finance Webster in the marihuana transaction in return for Webster getting him a direct factory connection for heroin (RT 181, 182). Walker said, "Are you going to front any money on this operation?" (RT 182). He told Walker that he would not put up any front money; he would not put up any money to go across the border. They returned in the car and Goldheimer and Walker left; Goldheimer said he could not go to Mexico then as he had some Court appearances (RT 182,183). Later he and Webster went to the CMA Airlines Office where he saw Webster fill out a tourist card for himself and one for the name "Irving Goldheimer." (RT 184, 185). On July 29th, he met Goldheimer with Webster at the Normandie Village Apartments and they went to the International Airport;

they bought a ticket; he saw Goldheimer check his suitcase (RT 185-187); he saw Goldheimer and Webster board Flight 911 (RT 187); between July 29th and August 4th, he had some conversations with Webster by telephone (RT 189); on August 4, 1960, he was at the airport and met Mexicana Airlines Flight and Webster and Goldheimer (RT 189,190); on the way in from the airport Goldheimer said he was unable to bring back any marijuana, that the money he had down there had been used; that it would be possible to get delivery at a later date (RT 193). Goldheimer was taken to the Normandie Village Apartments where he left the Agent and Webster; he stated that while they were coming in from the airport he had a recording device in the car and recorded their conversation between himself, Webster and Goldheimer (RT 196,197). He identified Government's Exhibit 1-B as a recording tape (RT 198). On August 10th, he met Walker and Goldheimer at the Pancake Restaurant; he had some discussion, nothing about narcotics (RT 199,200). The Agent stated to Goldheimer that he had about \$500 invested in this transaction and he was anxious to find out when Goldheimer could go to Guadalajara, Mexico; Goldheimer replied he was tied up for a while and could not go (RT 202); he

stated that at the conclusion of the conversation, he said to Goldheimer that he (the Agent) and Webster would go to Guadalajara about August 17th, where Webster would observe the heroin and he (Webster) and Wilson would make arrangements to accumulate marihuana, as much as they could get, and they would leave Guadalajara and come back to Los Angeles; he asked Goldheimer to leave Los Angeles as soon as he had made his Court appearances and come down and join him in Guadalajara (RT 204). Later the Agent said he said to Goldheimer, "Webster and I will go down on the 17th. He will come back for his Court appearance on the 21st or 22nd, * * * and you will come down and join me in Guadalajara, where we will finish getting the narcotics ready, and move them up to Ensenada where Walker will meet us with the boat. Is this agreeable to you?" Goldheimer said, "I guess it has to be." (RT 207) During these conversations, while they were riding in a car, he had a tape recorder in the car (RT 207,208). Exhibits 2-A, -B and -C were marked for identification. The witness identified Government's Exhibit 2-A, an envelope in which was contained a box containing Government's Exhibit 2-B, a tape recording (RT 209). On August 18th, he saw Webster, at which time Webster

bought a ticket on CMA to Guadalajara (RT 210); he saw Webster board the plane. Later, on September 5th, he saw Goldheimer at a restaurant on Sunset Boulevard (RT 210,211); he asked Goldheimer where Walker was and Goldheimer said he thought he was working on a boat making some repairs at a dock in Long Beach or San Pedro (RT 210-212); he next saw Goldheimer on Friday the 9th of September; he met him and Walker in Apartment 15 of the Normandie Village Apartments; he was accompanied by Agent Tingy, and he sent Tingy out to get a map; Tingy was employed by the Federal Bureau of Narcotics. He told Walker and Goldheimer that he had moved the narcotics up to Ensenada; that he had a map in the car which gave the location (RT 211, 212); Tingy returned with several other agents and they placed them under arrest (RT 213).

On cross examination, Agent Wilets stated that he would buy marihuana in return for introducing Webster as his agent into a factory connection for heroin; that he made this statement to Goldheimer; that he told Goldheimer that he had a substantial sum of money and that he had substantial financial backing; and he took a substantial sum of money out of his pocket and showed Goldheimer at the Scandia Restaurant (RT 236,

237), possibly \$2,000 or more (RT 237, 238). That before this meeting he had discussed with Webster having Webster go with Goldheimer to Mexico (RT 239); he had told Webster that he would defray all of Webster's expenses to Mexico (RT 239); that he first talked with Webster about Webster and Goldheimer driving an automobile to the interior of Mexico (RT 239, 240). He had discussed this matter with other agents and there were tentative plans to keep Webster and Goldheimer under observation on this trip (RT 240, 241). He stated that it was his opinion that if Webster and Goldheimer had crossed the border they then would have committed an overt act in support of conspiracy (RT 242, 243). That in his report to his superiors, Exhibit 5, he had made the statement, as follows: "On July 18, 1960, Goldheimer and the S.E. will be followed to the Mexican border, and their crossing will be observed. At this time a conspiracy will, in fact, exist." The S.E. was a designation by which he referred to Webster as a special employee (RT 243, 244).

Other Agents testified, including Leo Berman (RT 254) and Howard W. Chappell (RT 262). Chappell testified concerning his experiences in Mexico and meeting some persons there in connection with the sale

of narcotics. The defendant and appellant was not present at any of these meetings, nor were any discussions held with him by Agent Chappell concerning the same.

DEFENSE

EUGENE DUVALCOURT WALKER took the stand, denied any conspiracy between himself and Goldheimer concerning narcotics. He stated that upon one of their meetings, about June 23rd or 24th, Webster had asked him if narcotics could be brought from Mexico to the United States. He said that in view of his past experience with Customs Officers he thought it was feasible (RT 323, 324); he stated that Webster had told him that he had a man with a great deal of money who was looking for an investment; he thought the man had as much as \$30,000.00; he had money that he wanted to invest in a way that was not taxable (RT 324, 325).

IRVING GOLDHEIMER testified in his own behalf; he said he met Walker while he was in the City Jail at Long Beach; he was then 33 years of age. That he never discussed any plan or scheme to bring from Mexico to the United States narcotics while he was

in the jail (RT 363); he denied ever having told Webster while he was in jail that he had ever taken any marijuana from Mexico City to New York or any other place; that he had not brought narcotics into the United States. That he was released from jail in June, 1960. Some time after that Webster, who had asked him for his telephone number, called him (RT 362-365); Webster asked if he could meet him. That he had to go to court and so told Webster; when he arrived in court the next day Webster was sitting in the courtroom (RT 365). That he (Goldheimer) had borrowed a car from a friend and Webster asked him to drop him off some place, and while taking Webster, Webster said he had some stolen goods he was "looking to fence off or get rid of" (RT 366); he wanted to know if he (Goldheimer) knew anybody who could help him; he said he knew no such persons (RT 366). He had to go to court about three weeks later, and there he met Webster again; Webster was waiting for him in court (RT 366). Webster knew every time he had to go to court, apparently (RT 366). On this occasion Webster had no car and asked him to drop him off in San Pedro, which he did (RT 367). At one time while they were talking, Webster said he had a mink stole he would like to get rid of, and he

told him he knew no place where he could (RT 368). He said that some time later he met Webster at the Pancake Parade Restaurant; that prior to that time he and Webster had talked about Mexico; Webster spoke Spanish, and fluently; Webster said he had been there many times and they talked about Mexico; Webster told him he wanted to make some contacts in Mexico; he told Webster he knew some people there, but he did not know whether they had anything that he was looking for (RT 371). That the last time he met Webster was in Court, Webster had been waiting for him, and after his business was attended to, they went to the Coffee Shop in the Jergins Trust Building, and Webster then told him he was looking for narcotics, wanted to buy a lot of narcotics; he told Webster he knew nothing about buying a quantity of narcotics; he wasn't sure that he knew anybody that he was looking for (RT 372). The next time he met Webster, Webster told him he had a man with a lot of money and he wanted to know if he (Goldheimer) could make a trip with him and introduce him to some people in Mexico; he said he wanted to see if he could get an abundance of narcotics (RT 373). He said Webster asked him if he knew anyone there; he said he had no knowledge of narcotics, but he did know an American

who was living in Mexico, and Webster wanted him to introduce him to this man; Webster told him if he could get a large amount of narcotics there was money to be made and he (Webster) would take care of him; he said he had no money at the time, he had used up his money in paying for his lawyer. Webster told him he had a backer (RT 373, 374). Webster asked him to meet him at the Scandia, and he did, and there he met Agent Wilets; he had some drinks in the bar and then something to eat; during the course of their conversation, Wilets wanted to know if he could do anything for him; he said he didn't know whether he could or not; Wilets showed him \$2,000 and said he wanted to get a heavy amount of narcotics (RT 375); Wilets wanted him to go to Mexico and sort of set the situation up so he could get it; he told Wilets he was not too sure he could do it; Wilets told him he could put up \$10,000; he wanted Goldheimer and Webster to go down there and set up the situation for him; they were to attempt to arrange for the purchase of narcotics in Mexico (RT 376); Webster was to go to Mexico with him and they were to "pay the freight", pay all the expenses; that he (Goldheimer) had no money at the time and told Webster he had no money. Finally, after some meetings, he went to Mexico; Webster

got the tourists' cards and gave him one; he told Webster he had no money; Webster said if he scored big he would give him some money. He later met Webster and Wilets; Wilets drove them to the airport (RT 378); Webster came with Wilets and picked him up and they went to the airport; that he did not give Webster a hundred dollar bill, because he only had about \$50 on him; that he had told Webster he had no money, and that he (Webster) would have to pay for the tickets, and Webster did; that Webster knew this (RT 379). They went to Guadalajara; there they stayed at the Fenix Hotel, where Webster registered, and Webster paid the bills there; they stayed there about a week; the only thing he bought was a couple of meals and some cigarettes (RT 380). After arriving at Guadalajara, he made an effort to find Bryce Wilson, whom he had known for some time; he located him at Puerto Vallarta (RT 380-381); he had to fly over to Puerto Vallarta and Mr. Webster purchased the ticket for him. He found Wilson there; told him he had a friend who wanted to talk over business; he introduced Mr. Wilson to Webster, and Webster asked him if there was any possibility of obtaining heroin or marihuana; Wilson said he knew a few people, but wasn't sure, he would look

around and see what he could find out. Thereafter, they were in Guadalajara five or six days (RT 382, 383); after being in Guadalajara a day or so, Wilson took them to the penitentiary, where Wilson and Webster talked with some man in the jail; at that time he (Goldheimer) did not understand Spanish (RT 383, 384); when the discussions went on in the penitentiary, it was in Spanish and he did not understand it; they were at the penitentiary a couple of hours; they went back on another visiting day; he went there twice with Wilson and Webster; while they were in the penitentiary, some other man came into the cell and Wilson, Webster and the other man talked in Spanish; he saw no narcotics there; he did not understand what they were talking about (RT 384, 385); he did not smoke any marihuana while in the jail; while he and Webster were at Guadalajara he denied that he was to buy any narcotics, but merely to attempt to set it up for Wilets and Webster; he was not given any money to buy narcotics with (RT 387). After their trip to Mexico, he and Webster returned home, and Wilets met them at the airport; he did not know that Wilets was to meet them (RT 387). When Wilets met them at the airport, he drove Goldheimer home and Wilets and Webster sat in

the front seat of the car and he (Goldheimer) sat in the back seat. That Wilets wanted to know what the score was and how come they didn't come back with some narcotics; Wilets wanted to know if they had set it up for him and what was the delay; Wilets kept on questioning him and he asked Webster what they did down there; they said they went to jail and met this man, talked it over, but they needed more time to solicit and get the narcotics that he was looking for (RT 387, 388). Wilets didn't like the idea that he had to wait; Wilets was irritable, wanted to know what was really happening, how come they didn't set it up while they were down there. The witness stated that he had no intention of bringing back any narcotics for Wilets when he went there; he had no money with which to purchase narcotics; neither Wilets nor Webster had given him any money to purchase narcotics in Mexico (RT 388); Wilets wanted to know how they got into the jail, how they met these people, and how it was they could sit down in a cell and talk about narcotics. Wilets wouldn't believe that it was happening, that you could go to a jail and sit in these people's cell (RT 389). He had some discussion with Wilets and Webster about the method of transporting the narcotics from

Guadalajara to Los Angeles, into the United States (RT 389). They talked about bringing the narcotics back; they discussed the fact that it would be hard bringing them over the road, and Webster suggested they might use the boat "Pursuit"; he told Webster he had no jurisdiction over the boat; he knew nothing about that; one time he and Webster went down to look at the boat (RT 390). When he took Webster down to the boat, they looked it over, looked at some of the charts. He stated that he had been to sea; he was a merchant mariner by trade; prior to that he had been in the Army; he had known Walker about two years; he had no idea they could use the boat for a trip to Mexico; he had no control over it (RT 391). They talked about other boats, but not the "Pursuit"; he never had any discussion with Wilets about the possibility of bringing back narcotics by way of a truck, crossing the Gulf of California and coming up Baja California to Ensenada; that was Wilet's idea (RT 392). Wilets mentioned it was feasible enough if that could be done; he told Wilets he didn't know whether it could be done or not, he had never been there, he was not familiar with the roads in that country; he had never driven up Baja California to Ensenada; the only time he had ever been down there was

when he flew there (RT 392). After they returned, he saw Wilets again, and they discussed the subject of whether or not he, the witness, could go back to Mexico; Wilets said he wanted to go down and protect his money (RT 393). The witness stated he told Wilets he could not go, he had to go to Court; he told Wilets he could not go to Mexico (RT 394). That he had no intention of going back to Mexico (RT 394); he had no intention of having anything further to do with this transaction; he had no intention whatsoever of arranging for the purchase or sale of marihuana or narcotics when he went to Mexico with Mr. Webster (RT 394). That he didn't really know if the people could get that heavy amount of narcotics. That he had no money; Webster made the proposal, and Webster said he would pay all the bills. The witness was not working at the time, so he just went along (RT 394). That he would not have gone to Mexico at all except that Webster and Wilets asked him to; he had no intention of going there and breaking the law (RT 394). Before he talked with Wilets at the Scandia on the Sunset Strip, he did not know Nicolas Rodriquez Medina; he did not know a man by the name of Francisco Ochoa Mendez; he did not know the man described by Webster who came

to the penitentiary. He stated that between July 13, 1960, and continuing to August 30, 1960, he did not enter into any agreement or conspiracy, or have any understanding that he would receive, conceal, transport or facilitate the concealment and transportation of either heroin or marihuana; that he had no understanding with Wilson, Medina, Mendez, or anyone else (RT 395). That between the dates mentioned in the indictment, July 13, 1960, to August 30, 1960, he made no purchases, or made no effort to buy, sell, conceal or transport either marihuana or heroin, or any narcotics, and but for the discussions he had with Webster and Agent Wilets, he would not have gone to Mexico and attempted in any way to arrange for the sale or delivery of narcotics; but for their representations he would not have gone there (RT 395, 396).

STATUTES INVOLVED

Title 21 U.S.C., Sec. 174.

"Section 174. PENALTY; EVIDENCE.

Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than \$20,000. For a second or subsequent offense (as determined under section 7237(c) of the Internal Revenue Code of 1954), the offender shall be imprisoned not less than ten or more than forty years and, in addition, may be fined not more than \$20,000.

Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the

defendant explains the possession to the satisfaction of the jury."

Title 21 U.S.C., Sec. 176(a).

"Section 176a. SMUGGLING OF MARIHUANA; PENALTIES;
EVIDENCE; DEFINITION OF MARIHUANA.

Notwithstanding any other provision of law, whoever, knowingly, with intent to defraud the United States, imports or brings into the United States marihuana contrary to law, or smuggles or clandestinely introduces into the United States marihuana which should have been invoiced, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of such marihuana after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or whoever conspires to do any of the foregoing acts, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than \$20,000. For a second or subsequent offense (as determined under section 7237(c) of the Internal Revenue Code of 1954), the offender shall be imprisoned for not less than ten or more than forty years and, in addition, may be fined not more than \$20,000.

Whenever on trial for a violation of this subsection, the defendant is shown to have or to have had the marihuana in his possession, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains his possession to the satisfaction of the jury. ..."

SPECIFICATIONS OF ERROR

1. The Court erred in denying defendant and appellant's motions to grant a judgment of acquittal and in denying the motions for new trial. Entrapment was conclusively proven.

2. The defendant and appellant was denied a fair trial by reason of incidents occurring during the course of the trial, and particularly, the instruction of the trial court on the question of entrapment. The jury was improperly instructed as to entrapment.

3. As a matter of law, the guilt of the defendant was not established. The evidence was not sufficient, even if the evidence by all of the Government's witnesses is to be fully believed, as must be the situation here.

QUESTIONS PRESENTED FOR REVIEW

I

THE COURT ERRED IN DENYING DEFENDANT AND APPELLANT'S MOTIONS TO GRANT A JUDGMENT OF ACQUITTAL AND IN DENYING THE MOTIONS FOR NEW TRIAL. ENTRAPMENT WAS CONCLUSIVELY PROVEN.

II

THE DEFENDANT AND APPELLANT WAS DENIED A FAIR TRIAL BY REASON OF INCIDENTS OCCURRING DURING THE COURSE OF THE TRIAL, AND PARTICULARLY, THE INSTRUCTION OF THE TRIAL COURT ON THE QUESTION OF ENTRAPMENT. THE JURY WAS IMPROPERLY INSTRUCTED AS TO ENTRAPMENT.

III

AS A MATTER OF LAW, THE GUILT OF THE DEFENDANT WAS NOT ESTABLISHED. THE EVIDENCE WAS NOT SUFFICIENT, EVEN IF THE EVIDENCE BY ALL OF THE GOVERNMENT'S WITNESSES IS TO BE FULLY BELIEVED, AS MUST BE THE SITUATION HERE.

SUMMARY OF THE ARGUMENT

I

THE DEFENDANT AND APPELLANT GOLDHEIMER WAS ENTRAPPED INTO COMMITTING THE OFFENSES WITH WHICH HE HERE STANDS CHARGED AND CONVICTED.

II

THE COURT IN ITS COMMENT ON THE LAW OF ENTRAPMENT IN EFFECT EMASCULATED THE INSTRUCTIONS GIVEN TO THE JURY ON ENTRAPMENT.

III

THE COURT ERRED IN ADMITTING THE TESTIMONY OF HOWARD W. CHAPPELL CONCERNING HIS ACTIVITIES IN MEXICO. HE WAS NOT A CO-CONSPIRATOR, AND WHAT HE DID WAS AFTER THE CONSPIRACY HAD TERMINATED, IF IN TRUTH AND IN FACT THERE WAS A CONSPIRACY.

ARGUMENT

I

THE DEFENDANT AND APPELLANT GOLDHEIMER WAS ENTRAPPED INTO COMMITTING THE OFFENSES WITH WHICH HE HERE STANDS CHARGED AND CONVICTED.

We will not again repeat the testimony, for perhaps we have already been too verbose, but suffice it to say, summarized, the evidence is this:

That while Goldheimer was in the City Jail, he met the witness Webster, who had contacts with Deputy Sheriffs and a man who subsequently pled guilty to armed bank robbery, obtaining something in excess of \$10,000. This man had everything to gain by reason of his testimony. He spoke Spanish fluently; he had been under psychiatric treatment. While the Court stated to the jury that psychiatric treatment would no doubt benefit the man, it is for this Court to understand without question that he had been examined and prescribed for by a psychiatrist. The evidence plainly shows that Goldheimer met Webster in jail at Long Beach, where they talked about Mexico. Goldheimer had been to Mexico; he had a friend or two there. There

is no evidence that he had ever been engaged in the narcotic traffic in Mexico. The evidence established that Webster was a pretty smart fellow, as an examination of his testimony will show. Albeit he may be psychotic, but under all the circumstances only one fair deduction can be drawn, that is, that he was a smooth, articulate fellow, thoroughly conversant with Mexico and the Mexican language. It was he, after the release of Goldheimer from the City Jail in Long Beach, who looked up Goldheimer, and who first proposed to Goldheimer that he (Goldheimer) introduce him to someone in Mexico. Thereupon, Webster was introduced to Wilets, the Government Narcotic Agent, by a Deputy Sheriff with whom he had had contact in connection with his prior difficulties, and then the plans were laid. Wilets explained to Goldheimer that he had a large sum of money, and it was the Government Agent Wilets who advanced the funds to Webster to even buy the ticket to Guadalajara for Goldheimer. It was Webster who paid the expenses. The record shows that Webster had been given something over \$600, and then it was that Goldheimer, having nothing else to do, was induced by Webster and Wilets to go to Mexico. All in the world Goldheimer did was attempt to find a

friend; he didn't know whether the man could arrange for narcotics or not. His friend Wilson was then introduced to Webster and, after they had been in Mexico some days no definite arrangements, or any arrangements, were solidified for the purchase or delivery of any narcotics, either marihuana or heroin. Thereupon, Webster and Goldheimer returned to Los Angeles.

Notwithstanding the importunations of both Webster and the Government Agent Wilets, under whose specific direction he was working, Goldheimer never went to Mexico again; said he couldn't, and said he wouldn't have gone under any circumstances. He received no money, and there was no definite understanding. Being out of work, he merely took Webster to Mexico, or rather went with him, and took him to a friend. No arrangements for the delivery or sale of narcotics were ever consummated. Whatever he did insofar as he did it, he was honest, he was specific and frank with the Court, and the evidence shows that, as a matter of law, he was entrapped. We respectfully direct Your Honor's attention to the following legal discussion and authorities which we think are ample support for our position. The case

should be reversed.

1. Entrapment.

It is our contention that the law of entrapment is applicable in this case.

One of the latest expressions on the subject is Sherman v. United States, 78 Supreme Court Reporter No. 14, 819, at p. 820, where the court said:

"In Sorrells v. United States, 287 U.S. 435, 53 S.Ct. 210, 77 L.Ed. 413, this Court firmly recognizes the defense of entrapment in the federal courts. The intervening years have in no way detracted from the principles underlying that decision. The function of law enforcement is the prevention of crime and the apprehension of criminals. Manifestly, that function does not include the manufacturing of crime. Criminal activity is such that stealth and strategy are necessary weapons in the arsenal of the police officer. However, 'a different question is presented when the criminal design originates with the officials of the government, and they implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that they may prosecute.'

(Emphasis supplied) 287 U.S. at p. 442, 53 S. Ct. at p. 212. Then stealth and strategy become as objectionable police methods as the coerced confession and the unlawful search. Congress should not have intended that its statutes were to be enforced by tempting innocent persons into violations.

"However, the facts that government agents 'merely afford opportunities or facilities for the commission of the offense does not' constitute entrapment. Entrapment occurs only when the criminal conduct was 'the product of the creative activity' of law-enforcement officials. See 287 U. S. at pp. 441, 451, 53 S. Ct. at 212, p. 216. To determine whether entrapment has been established, a line must be drawn between the trap for the unwary innocent and the trap for the unwary criminal. The principles by which the courts are to make this determination were outlined in Sorrells. On the one hand, at trial the accused may examine the conduct of the government agent; and on the other hand, the accused will be subjected to an 'appropriate and searching inquiry into his own conduct and predisposition' as bearing on his claim of innocence. See 287 U. S. at p.

451, 53 S. Ct. at p. 216.

"We conclude from the evidence that entrapment was established as a matter of law. In so holding, we are not choosing between conflicting witnesses, nor judging credibility. Aside from recalling Kalchinian, who was the Government's witness, the defense called no witnesses. We reach our conclusion from the undisputed testimony of the prosecution's witnesses.

"It is patently clear that petitioner was induced by Kalchinian. The informer himself testified that, believing petitioner to be undergoing a cure for narcotics addiction, he nonetheless sought to persuade petitioner to obtain for him a source of narcotics. In Kalchinian's own words we are told of the accidental, yet recurring meetings, the ensuing conversations concerning mutual experiences in regard to narcotics addition, and then of Kalchinian's resort to sympathy. One request was not enough, for Kalchinian tells us that additional ones were necessary to overcome, first, petitioner's refusal, then his evasiveness, and then his hesitance in order to achieve capitulation. Kalchinian

not only procured a source of narcotics but apparently also induced petitioner to return to the habit. Finally, assured of a catch, Kalchinian informed the authorities so that they could close the net. The Government cannot disown Kalchinian and insist it is not responsible for his actions. Although he was not being paid, Kalchinian was an active government informer who had but recently been the instigator of at least two other prosecutions. Undoubtedly the impetus for such achievements was the fact that in 1951 Kalchinian was himself under criminal charges for illegally selling narcotics and had not yet been sentenced. It makes no difference that the sales for which petitioner was convicted occurred after a series of sales. They were not independent acts subsequent to the inducement but part of a course of conduct which was the product of the inducement. In his testimony the federal agent in charge of the case admitted that he never bothered to question Kalchinian about the way he had made contact with petitioner. The Government cannot make such use of an informer and then claim disassociation through ignorance.

"The Government sought to overcome the defense of entrapment by claiming that petitioner evinced a 'ready complaisance' to accede to Kalchinian's request. Aside from a record of past convictions, which we discuss in the following paragraphs, the Government's case is unsupported. There is no evidence that petitioner himself was in the trade. When his apartment was searched after arrest, no narcotics were found. There is no significant evidence that petitioner even made a profit on any sale to Kalchinian. The government's characterization of petitioner's hesitancy to Kalchinian's request as the natural wariness of the criminal cannot fill the evidentiary void. The Government's additional evidence in the second trial to show that petitioner was ready and willing to sell narcotics should the opportunity present itself was petitioner's record of two past narcotics convictions. In 1942 petitioner was convicted of illegally selling narcotics; in 1946 he was convicted of illegally possessing them. However, a nine-year-old sales conviction and a five-year-old possession conviction are insufficient to prove petitioner had

a readiness to sell narcotics at the time Kalchinian approached him, particularly when we must assume from the record that he was trying to overcome the narcotics habit at the time.

"The case at bar illustrates an evil the defense of entrapment is designed to overcome. The Government informer entices someone attempting to avoid narcotics not only into carrying out an illegal sale but also into returning to the habit of use. Selecting the proper time, the informer then tells the government agent. The set up is accepted by the agent without even a question as to the manner in which the informer encountered the seller. Thus the Government plays on the weaknesses of an innocent party and beguiles him into committing crimes which he otherwise would not have attempted (c.f. e.g., Lufty v. United States, 9 Cir., 198 F. 2d 760, 33 A.L.R. 2d 879; Wall v. United States, 5 Cir., 65 F. 2d 993; Butts v. United States, 8 Cir., 273 F. 35, 18 A.L.R. 143). Law enforcement does not require methods such as this. * * * *

"The judgment of the Court of Appeals is reversed, and the case is remanded to the District

Court with instructions to dismiss the incident.

"Reversed and remanded."

(Concurring Opinion of Mr. Justice Frankfurter):

"The courts refuse to convict an entrapped defendant, not because his conduct falls outside the prescription of the statute, but because, even if his guilt be admitted, the methods employed on behalf of the Government to bring about conviction cannot be countenanced. As Mr. Justice Holmes said in Olmstead v. United States, 277 U.S. 438, 470, 48 S.Ct. 564, 575, 72 L. Ed. 944

(dissenting) in another connection, 'It is desirable that criminals should be detected, and to that end that all available evidence should be used. It is also desirable that the Government should not itself foster and pay for other crimes, when they are the means by which the evidence is to be obtained. * * * *for my part I think it a less evil that some criminals should escape than that the government should play an ignoble part.'

"Insofar as they are used as instrumentalities in the administration of criminal justice, the federal courts have an obligation to set their

face against enforcement of the law by lawless means or means that violate rationally vindicated standards of justice, and to refuse to sustain such methods by effectuating them. They do this in the exercise of a recognized jurisdiction to formulate and apply 'proper standards for the enforcement of the federal criminal law in the federal courts', McNabb v. United States, 318 U. S. 332, 341, 63 S.Ct. 608, 613, 87 L. Ed. 819, an obligation that goes beyond the conviction of the particular defendant before the court. Public confidence in the fair and honorable administration of justice, upon which ultimately depends the rule of law, is the transcending value at stake." (Emphasis supplied.)

II

THE COURT IN ITS COMMENT ON THE LAW
OF ENTRAPMENT IN EFFECT EMASCULATED
THE INSTRUCTIONS GIVEN TO THE JURY
ON ENTRAPMENT.

We respectfully direct the Court's attention to the discussion by the Court on the subject of entrapment (RT 426-430):

"The defense of unlawful entrapment is offered by the defendants to each crime charged in the indictment.

"The law recognizes two kinds of entrapment: Unlawful entrapment and lawful entrapment. Where a person has no previous intent or purpose to violate the law, but is induced or persuaded by law enforcement officers to commit a crime, he is entitled to the defense of unlawful entrapment, because the law as a matter of policy forbids a conviction in such a case.

"On the other hand, where a person already has the readiness and willingness to break the law, the mere fact that the government agent provides what appears to be a favorable

opportunity is no defense, but is a lawful entrapment. When, for example, the government has reasonable grounds for believing that a person is engaged in the illicit sale of narcotics, it is not unlawful entrapment for a government agent to pretend to be someone else and to offer, either directly or through an informer or other decoy, to purchase narcotics from such suspected person.

"If then the jury should find from the evidence that, before anything at all occurred respecting the alleged offenses involved in this case, the accused was ready and willing to commit crimes such as those charged in the indictment whenever opportunity was offered, and the government merely offered the opportunity, the accused is not entitled to the defense of unlawful entrapment.

"If, on the other hand, the jury should find that the accused had no previous intent or purpose to commit any offense of the character here charged, and did so only because he was induced or persuaded by some agent of the government, then the prosecution has seduced an innocent person, and the defense of unlawful entrapment is a good

defense, and the jury should acquit the accused.

"This question of lawful and unlawful entrapment is sometimes a little difficult to explain. The leading case on it came up during the prohibition era when some prohibition agents went to a man's home, and one of them said, 'Well, we are --' This is right after World War I when prohibition came in.

" 'We are old war buddies; used to be in the 30th Division together.' And this man, the defendant, was in the 30th Division, too. And they talked about old times. Then the government agent, who was claiming to be a business man somewhere, said something about could he get a quart of whiskey. And the defendant didn't respond to that. But they talked on, and finally the defendant went somewhere and produced, as I recall, a quart of whiskey. And the government agent paid him for it, and then arrested him for selling alcoholic beverages in violation of the law.

"The claim was made that this man was not a bootlegger, and there was no evidence that he was; and that he was doing this as a favor to an old war buddy of the 30th Division, as I recall. So

the Supreme Court said, 'Under those circumstances, where the man had no predisposition to bootleg whiskey and was enticed into it by government agent, that the defense of unlawful entrapment was available to the defendant.'

"We have entrapment in all kinds of cases. If you have had jury service, you probably have run across it in cases dealing with the theft of mail. Postal inspectors use it all the time. If they think a postal employee is stealing money from the mails, like March of Dimes, Community Chest, Red Cross, things like that, they get some envelopes and put some money in them and put them in the postal system. And that circulates around. And they watch this man through a peephole, sometimes with a telescope, and when one of those letters comes around to him, they watch him and if he takes that letter, they close in on him and make an arrest. Now, he's been entrapped.

"The clearest way I know how to put it, it's a difference of being entrapped into committing the crime, or entrapped into getting caught. If you are entrapped into getting caught, that is perfectly legal; because all police officers have

to do -- particularly in a case where there is stealth involved, and small objects involved. It's not much trouble to catch a man with an automobile, but it is quite a bit of trouble to catch him with a letter with some currency in it before he opens the letter and throws it away and puts the currency in his pocket. And it's the same way with narcotics.

"So, when you come right down to the distinction, you are passing upon what kind of a man is the defendant? Was he seduced? Was he an innocent person who had no disposition -- if it's narcotics, he had no disposition to engage in narcotics, but was enticed and persuaded, an innocent man; then, as the law says, he has been seduced. But if he has the previous disposition, if he is perfectly willing to sell and all he needs is a buyer, the fact that a government agent -- and they do it all the time, dress up like tramps, or something else, and they go into these places, as they say, to 'make buys'; and the fact that they pretend to be someone else and catch this man is no unlawful entrapment.

"I hope I have made it a little clearer for

you. But the best way I can think of it, in shorthand and very briefly put, is if the man is entrapped into committing a crime when he has no previous disposition to commit it -- I am not talking about a particular crime. But if a man is engaged in selling narcotics, the fact that he might not have made this particular sale if the government agent hadn't come along and pretended to be somebody he wasn't, that is no unlawful entrapment. But if he is not in that business, if he has no disposition to be in that business and he is enticed into it by a government agency, the policy applies -- it is unlawful entrapment.

"But if he is willing, if he has criminal notions, criminal intent, the fact that the government provides him the opportunity to commit the crime and thus entraps him into getting caught, is not an unlawful entrapment".

One must read the entire discussion to properly understand the unfortunate effect that such discussion would have upon the jury. The Court started out by giving a proper definition of entrapment, but then when it resorted to this explanation found on p. 428 of the

Transcript:

"The claim was made that this man was not a bootlegger, and there was no evidence that he was; and that he was doing this as a favor to an old war buddy of the 30th Division, as I recall. So the Supreme Court said, 'Under those circumstances, where this man had no predisposition to bootleg whiskey and was enticed into it by government agent, that the defense of unlawful entrapment was available to the defendant.'

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and make an arrest. Now he's been entrapped." a careful reading of this clearly indicates that the Court felt that here was a man with some predisposition to sell narcotics, when in truth and in fact there is nothing in this record from which such a deduction can be drawn.

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III

THE COURT ERRED IN ADMITTING THE TESTIMONY OF HOWARD W. CHAPPELL CONCERNING HIS ACTIVITIES IN MEXICO. HE WAS NOT A CO-CONSPIRATOR, AND WHAT HE DID WAS AFTER THE CONSPIRACY HAD TERMINATED, IF IN TRUTH AND IN FACT THERE WAS A CONSPIRACY.

Howard W. Chappell was called by the Government and testified he was the agent in charge of the Los Angeles Office of the Bureau of Narcotics; that on August 19, 1960, he arrived in Guadalajara; he checked into a motel and looked for Webster. He was unable to find him. Later he found Webster.

The agent thereafter stated his activities with Webster and related some conversations with Bryce Wilson, and his conduct and contact with Webster, Wilson and other persons. All this evidence, which is to be found on pp. 262 to 283 of the Reporter's Transcript, Volume 2, relates contacts with persons in Mexico, discussions about narcotics, all in the absence of Goldheimer, who was actually in the United States at the time. Strenuous objection was made to all of this, as is shown by the record, (RT 262-270):

"Q Mr. Chappell, I direct your attention to August 19, 1960. Did you arrive in Guadalajara on that date?

A Yes, sir, I did.

Q At approximately what time did you arrive?

A Approximately 7:00 or 8:00 o'clock at night.

Q Were you met at the airport by anyone?

A No, sir, I was not.

Q What did you do following your arrival at the airport?

MR. PARSONS: To which I object as being incompetent, irrelevant and immaterial. In the light of the present testimony and in view of it, whatever Mr. Chappell did from this date on is incompetent, irrelevant and immaterial to any objective of the conspiracy, if in proof and in fact there was one.

THE COURT: What is the date?

MR. LONG: August 19th, your Honor.

THE COURT: Overruled.

THE WITNESS: I checked into a hotel. After I had checked into the hotel I made a check at a second hotel, the Virreinal, looking

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MR. LONG: August 19th, your Honor.

THE COURT: Overruled.

THE WITNESS: I checked into a hotel. After I had checked into the hotel I made a check at a second hotel, the Virreinal, looking

for Special Employee Webster. I was unable to find him. I then returned to my own hotel, after leaving a message at Webster's hotel for him to contact me.

Q BY MR. LONG: Did Mr. Webster contact you?

A On August 21st --

MR. PARSONS: Your Honor, in the interest of brevity -- I know sometimes this isn't the best way to do it, but may we have a continuing and running objection to anything that occurred after this date by, or was done by Mr. Chappell, or any conversation --

THE COURT: After which date?

MR. PARSONS: August 19th, the date that he arrived in Guadalajara. It's our contention that what Mr. Chappell did then is incompetent, irrelevant and immaterial. The conspiracy, if in truth there was one, had been terminated at that time, in the light of the evidence as it now stands. And what he did is immaterial.

MR. LONG: Your Honor, the Government -- do you wish to hear the Government?

THE COURT: Isn't the evidence that the delivery was supposed to be made some time on

the 20th?

MR. PARSONS: I grant there was a delivery date, there was some discussion. I am reminded there was some discussion about that. But, regardless of that, Mr. Goldheimer had returned to Los Angeles by that time and had not returned to Mexico. And what Mr. Chappell did -- he is not a member of the conspiracy. What he did and said with various people is not binding upon Goldheimer. And I don't want to continually object.

THE COURT: No. You may have the objection. Of course, if he isn't a member of the conspiracy, anything he said or did --

MR. PARSONS: Even Webster is a feigned member of the conspiracy, not an actual --

THE COURT: -- anything he said or did would be certainly not binding upon any member of the conspiracy. I understand it's offered as corroborative of some earlier testimony.

MR. LONG: Your Honor, it's the Government's contention that the conspiracy continued until August 30th, at the time that the three co-conspirators who are not present, were arrested.

THE COURT: Very well. Proceed. It will be for the jury to decide, first, whether there was a conspiracy, and, secondly, who belonged to it, and, thirdly, how long it continued.

Proceed.

Q BY MR. LONG: Mr. Webster did meet you?

A Yes, sir, he did.

THE COURT: Certainly, after the conspiracy is over, why, what the former conspirators did cannot bind others who were formerly members of the conspiracy. Just like when a partnership is dissolved, the former partners can't bind each other any more.

Proceed.

Q BY MR. LONG: Did you have occasion to meet Mr. Bryce Wilson on August 21st?

A Yes, sir, I did.

Q By whom was he introduced?

A By Webster.

Q And where did you meet Mr. Wilson?

A In a little bar around the corner from my hotel just off main street in Guadalajara.

Q Did you have any conversation with Mr. Wilson at this time?

A Yes, sir, I did.

Q. Would you tell the court and the jury what Mr. Wilson said to you and what you said to Mr. Wilson on this occasion?

THE COURT: Was anyone else present?

THE WITNESS: Yes, sir.

Q BY MR. LONG: Who else was present?

A Mr. Webster, he was intermittently present. Let me clear that up. He was intermittently present. He made the introduction --if I may explain -- of Wilson to me, and then he proceeded to the bar to order a drink. And then he left the table on one or two occasions to get Mexican hors d'oeuvres that they were serving in the place. He was generally present during most of the conversation.

Q The conversation to which we will now refer is the conversation between you and Mr. Wilson?

A Yes, sir.

Q What did Mr. Wilson say to you and what did you say to him?

A We acknowledged the introductions. And I immediately asked him why the negotiations were delayed. I said, 'My people have been given to

believe by Goldheimer this transaction would be completed by the 21st. I have been in Guadalajara since the 19th, and this is the first that I have seen you.'

Bryce Wilson stated, 'Well, everything is all set.' He said, 'The weed is all set to go, but we can't get the heroin.'

I said, 'I am interested in heroin. And why can't we get it? It was my understanding everything would be set by tonight.' Which was the 21st.

He stated, 'The people got rid of the heroin, and we will have to wait about a week or so for them to convert some more.'

I then asked him whether we couldn't expedite it. I said, 'This is costing me money. I have been laying around here two days. I am anxious to get this over with.'

And he insisted the marijuana would be ready --

THE COURT: Who?

THE WITNESS: This is Wilson. He stated to me, 'The marijuana can be ready tomorrow, or at the latest in 48 hours.'

Q BY MR. LONG: Mr. Chappell, were you using an assumed name during the period of your stay in Guadalajara?

A Yes, sir, I was.

Q What was that name?

A Bill, William Heddeggin, H-e-d-d-e-g-i-n.

Q Were you representing yourself to be a certain type of individual, Mr. Chappell?

A Yes, sir. I told Wilson that I was there to protect the money and see that our interests had not dwindled, that we didn't get beaten for the money, or the money wasn't stolen.

Q During your conversation with Mr. Wilson on August 21st in the bar, was there any discussion about the delivery of the marijuana and the heroin, if and when the heroin becomes available?

A Yes. Wilson, after my first statement to him and after his answers to me, asked me where Goldheimer was at. I told him that Goldheimer had to be in trial on the following day, which was a Monday, that he couldn't come down; I was not sure whether he would come or not.

At that Wilson stated to me, 'Well, is

Walker going to have the boat at Ensenada?'

And I said, 'All arrangements are made. As soon as I have seen the stuff and I have possession of it, we will call Los Angeles and the boat will leave immediately for Ensenada.'

And I then said, 'We figure that the boat can make the trip from Los Angeles to Ensenada in the same period of time that we can make it from here to Ensenada.'

I then said to Wilson, 'I do not understand why you have arranged for this Mickey Mouse way of delivery.' And he asked me what I meant.

And I said, 'According to Goldheimer you want to cross the stuff over on to the Baja California coast and then go all the way up the coast to Ensenada.' I told him, I said, 'I have been over that road and I know that nothing less than a truck with four-wheel power can get over that road.'

And he said, 'Well, these are Hollywood people, and they have got to do the scene a certain way.'

And I said, 'Well, its ridiculous, because there is no need to go that way.'

And he said, 'They did not want to cross into the United States, and then come back into Ensenada.'

And I said, 'No need to do that. There is a new road, Highway No. 1, Mexican highway, new highway cuts over San Luis, and from San Luis into Mexicali, then go through Tecate, Tijuana, and into Ensenada without crossing over to the Baja California mainland.'

Q Did you discuss any alternate route with Mr. Wilson at that time?

A Well, he said that he didn't see why we wouldn't be better off taking the route I just suggested instead of going into Baja California."

There is a discussion between Chappell, Wilson and Medina about narcotics (RT pp. 274,275), all of which was highly prejudicial and could in no way involve Goldheimer. Our objection should have been sustained.

We have already contended that whatever Goldheimer did he was induced and entrapped into doing. We respectfully contend that the trial court, in admitting

the evidence of Chappell, which we have just referred to and which relates to the acts and declarations of alleged co-conspirators made out of the presence of the accused Goldheimer, was in error.

See People v. Busby, 40 Cal. App. 2d 193,
104 P. 2d 531;
People v. Kelly, 133 Cal. 1, 64 Pac. 1091.

Statements made by one defendant outside the presence of his co-defendant, and after consummation or frustration of the conspiracy, are hearsay.

People v. Gilliland, 39 Cal. App. 2d 250,
103 P. 2d 179;
People v. Doble, 203 Cal. 510, 265 Pac. 184;
People v. Singh, 1 Cal. App. 2d 729, 37 P.
2d 481.

Acts of Co-conspirators.

In order that an act of a co-defendant may be imputed to a defendant in a criminal action, the particular act must be shown to have been done in furtherance of the common object and design for which the defendants have combined.

People v. Werner, 16 Cal.App. 2d, 216, 105
P. 2d 927.

This was aggravated by the fact that Agent Chappell was attempting to lure these people into committing offenses, and it was Mr. Chappell who was making the statements and eliciting the conversations, all in the absence of Goldheimer, without his knowledge, consent or ratification.

This type of thing has been repeatedly condemned by the courts, and the use of the conspiracy statute to attempt to convict defendants, such as here, where there was no possibility of convicting of a substantive crime insofar as Goldheimer was concerned, has been condemned by the Supreme Court of the United States in no uncertain words.

See Krulewitch v. United States, 336 U.S. 440,
69 S. Ct. 716.

CONCLUSION

WHEREFORE, the defendant and appellant Irving Goldheimer respectfully prays that the judgment herein be reversed.

Respectfully submitted,

RUSSELL E. PARSONS and
HARRY E. WEISS

By Russell E. Parsons

Attorneys for Defendant-
Appellant Irving Goldheimer

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No. 17382

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

EUGENE DUVALCOURT WALKER and IRVING GOLD-
HEIMER,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF OF APPELLEE.

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BRIEF OF APPELLEE.

I.

STATEMENT OF JURISDICTION.

Appellants Irving Goldheimer and Eugene Duvalcourt Walker together with Bryce Wilson, Nicholas Rodriquez Medina and Francisco Ochoa Mendez were indicted by a Federal grand jury for the Southern District of California on September 28, 1960, in two counts for violations of Title 21 United States Code Sections 174 and 176. The first count charged that beginning on or about July 13, 1960, and continuing to August 30, 1960, the appellants together with the other defendants named therein conspired together to knowingly and unlawfully receive, conceal, transport and facilitate

the concealment and transportation and sell and facilitate the sale of heroin which the defendants knew would have been imported into the United States contrary to United States Code Title 21, Section 173; to knowingly smuggle and clandestinely introduce into the United States from Mexico, heroin with intent to defraud the United States which merchandise should have been invoiced prior to importation into the United States in violation of United States Code Title 21, Section 174. The second count charged that beginning on or about July 13, 1960, and continuing to August 30, 1960, the appellants together with the other defendants named therein conspired to knowingly and unlawfully receive, conceal, transport and facilitate the concealment and transportation and sell and facilitate the sale of marihuana which the defendants knew would have been imported into the United States contrary to law; to knowingly and willfully smuggle and clandestinely introduce into the United States from Mexico marihuana with intent to defraud the United States which merchandise should have been invoiced prior to importation into the United States in violation of United States Code Title 21 Section 176.

The appellants pleaded not guilty to both counts and after a trial before a duly constituted jury which commenced on November 2, 1960, and concluded on November 7, 1960, the appellants were found guilty on both counts.

The appellants have filed notices of appeal and though they are represented by different counsel and have submitted separate opening briefs, it is believed that in view of certain common questions which are raised in both briefs, needless duplication in argument

can be avoided if one reply brief is submitted by the appellee to respond to the contentions raised in the appellants' two opening briefs.

The jurisdiction of the District Court was based upon Title 18, United States Code Section 3231 and this Court has jurisdiction to entertain the appeal and review the judgments in question under the provisions of Title 28 United States Code Sections 1291 and 1294.

II.

STATUTES INVOLVED.

United States Code Title 21 Section 174 provides in part as follows:

“Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than \$20,000.”

“Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.”

United States Code Title 21 Section 176a provides in part as follows:

“§176a. Smuggling of marihuana; penalties, evidence; definition of marihuana.

“Notwithstanding any other provision of law, whoever, knowingly, with intent to defraud the United States, imports or brings into the United States marihuana contrary to law, or smuggles or clandestinely introduces into the United States marihuana which should have been invoiced, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of such marihuana after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or whoever conspires to do any of the foregoing acts, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than \$20,000.”

“Whenever on trial for a violation of this subsection, the defendant is shown to have or to have had the marihuana in his possession, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains his possession to the satisfaction of the jury.

“As used in this section, the term ‘marihuana’ has the meaning given to such term by section 4761 of the Internal Revenue Code of 1954.”

III.

STATEMENT OF FACTS.

There are set forth below a summary of the principal evidence upon which the Government relies to support the convictions of the appellants in this case:

James Ralph Webster, a special employee of the Federal Bureau of Narcotics, identified appellant Goldheimer in the courtroom and testified that he met him at a jail in Long Beach, California, in the latter part of May 1960 [Tr. 5, 11],¹ that Goldheimer told him that he had been to Mexico, that he had narcotics sources there and that he had previously imported marihuana from Mexico to New York and that he had just returned from Mexico not too long prior to his being arrested [Tr. 13], that he had an associate or friend who had a boat and that they were intending to import a large quantity—200 kilos—of marihuana “up to this area” and that they had “the contacts on the Mexican side ‘all lined up’ ” [Tr. 14]. Webster further testified that he met Donald Wilets, an agent of the Federal Bureau of Narcotics, on June 3, 1960, and on June 23, 1960 [Tr. 18] and outlined to him the conversations he had with Goldheimer, telling Wilets that he had been approached by a man (Goldheimer) who had a source of supply and a method of transportation for importing narcotics into the United States [Tr. 17-19].

On June 29, 1960, Webster met Goldheimer and Walker and Goldheimer asked him if he “wanted to see the boat”, and stated that he and Walker were going down to fuel the boat and Webster could see it [Tr.

¹Tr. refers to the Transcript of Proceedings in the trial court.

21]. Webster stated that narcotics and the importation of narcotics were a topic of conversation at this meeting just as on each of his meetings since "we came together for that purpose" [Tr. 23]. The three individuals drove to Newport where the yacht of which Walker was captain was berthed and they arrived there between 11 P.M. and midnight and stayed until 7 the next morning [Tr. 24]. While on the yacht Goldheimer showed Webster a lot of charts and told him that he and Walker had one chart on which they had drawn out a course to some point below Ensenada and had worked out a landing area where "a transshipment could be made of the narcotics on board the vessel" [Tr. 25]. That night during a conversation with Walker, discussing the method of shipment of marihuana, Walker stated that the best plan, and what he intended to do, was to have it wrapped in water proofed packages, compressed and put into sail bags which are canvas bags that are put on decks when the ship is at sea and that are always empty. Walker also stated that he was not absolutely sure of the customs formalities in returning from a foreign run on a yacht and that he was going to check into it [Tr. 26]. There were other conversations that night between Walker, Goldheimer and Webster in which the topic of narcotics and the transportation thereof "was the usual topic" (*ibid*). In discussing finances Goldheimer stated that he had some money on deposit with a Bryce Wilson in Guadalajara [Tr. 27]; that if their venture was successful Goldheimer, Walker, Wilson and Webster were each to receive 25 per cent of the total profits above expenditures and that Webster was to put some money into the enterprise depending on the

final amount of narcotics that was to be handled [Tr. 27, 28].

On June 27, 1960, Webster suggested to Goldheimer that he meet his financial backer. Goldheimer had previously expressed a desire to meet him [Tr. 30] and on July 13, 1960, Webster and Wilets met Goldheimer at the Scandia Restaurant on the Sunset Strip [Tr. 31] and Goldheimer told Wilets that there was narcotics available through his sources and that a source of transportation, a yacht, was readily available [tr. 32].

On July 14, 1960, Goldheimer, Walker, Webster and Wilets, met together at a restaurant and then went for a ride [Tr. 34] during which Goldheimer asked Webster and Wilets how the plan "looked" and Walker asked if Wilets was going to "front any money" [Tr. 35].

On July 28, 1960, Webster met Goldheimer who said he would be ready to go to Mexico the following day and requested Webster to make all the arrangements [Tr. 36]. These were accomplished and on the next day Wilets drove Webster out to pick up Goldheimer and the party then drove to the airport. The conversation in the car concerned bringing the thing "to a head" and obtaining a clear commitment down below on what they were supposed to get [Tr. 38]. Webster and Goldheimer debarked at Guadalajara but they could not find Bryce Wilson there and Goldheimer then left Guadalajara and flew to Puerto Vallarta [Tr. 39] and returned the following day with Wilson [Tr. 41]. Goldheimer told Webster that Wilson had spent his money and that they would go to the Jalisco State Jail in Guadalajara the following day to meet with one of the sources of supply [Tr. 42]. They

went to the prison where they met an inmate named Bonifacio Talaveras [Tr. 44] with whom they discussed the availability and the prices of marihuana and the availability of heroin. Talaveras said that marihuana was available in a week or two but that he didn't know about the heroin but that he would send someone out to see about it [Tr. 46, 47]. A runner sent out by Talaveras returned with an individual named Ramundo who stated that there was a kilogram of heroin available in a week or two and that the price would be 10,000 American dollars [Tr. 49, 50] which Webster said was too high but Goldheimer and Wilson said that it was a fair price and Goldheimer also stated "well that's the price its always been" [Tr. 50]. Webster and Goldheimer returned to their hotel with Wilson and when Goldheimer went with Wilson to the hotel at which Wilson was stopping, Webster called Wilets and outlined what had happened in the jail [Tr. 51, 52]. Webster, Goldheimer and Wilson returned to the jail a few days later and Webster stated that \$10,000 would be acceptable but that he would want a firm delivery date and Ramundo stated that there would be a kilo available on August 14 which could be held until August 21 [Tr. 53, 54]. Goldheimer suggested that the heroin and the marihuana should be bought at one time for one delivery on the yacht and Talaveras said that the marihuana would be available at the same time as the heroin. Ramundo then gave Wilson, Webster and Goldheimer the name and address of a man outside of the prison whom he said was the heroin and opium connection [Tr. 54]. Ramundo's "connection" was a man named Alfredo Medina and his name and address was written by Ramundo on a slip of paper which he gave to Wilson [Tr. 54].

After leaving the jail the plans for delivery were discussed in conversations held at the Fenix Hotel in Guadalajara by Wilson, Goldheimer and Webster [Tr. 57] and Wilson said he would go back to his home in Yalapa since the heroin was not immediately available and that he would return to Guadalajara on August 14 at which time he would meet Medina in San Pedro, Tlaquepaque, to get a sample of the heroin and that he would then forward a sample to Webster in the United States so that there would be some token of good faith and ability of supply on the part of the people they were dealing with [Tr. 59]. Goldheimer said that nothing should be done about the marihuana until the heroin was obtained so that it could be put together in one package and one delivery could be made. It was agreed that Goldheimer and Webster would return to Guadalajara on August 21 after having received the heroin sample in the United States and that in the meantime Wilson would remain in Guadalajara and see about getting the marihuana together and starting to package it. Goldheimer said he would contact Walker to arrange for a final delivery of the heroin and the marihuana by them to Walker in Ensenada [Tr. 60]. Webster stated that as to the payment for their trip to Mexico, Goldheimer had given him a \$100 bill but said that he was a little short and Webster paid the remaining \$37.00 for the ticket and that in addition he had purchased lunch for Goldheimer several times in Mexico but that he had given him no other funds [Tr. 61]. Webster and Goldheimer returned to the United States together on August 4 and they were met at the airport by Wilets [Tr. 63]. Goldheimer told Wilets that arrangements had been made to pick up both heroin and marihuana in Guadalajara on August

21 and that it had been decided to make it a package deal so that the heroin would not be imported without the marihuana and the price was \$10,000 in American dollars [Tr. 64].

Another meeting was held between Webster, Walker, Goldheimer and Wilets on August 10 and after a cup of coffee in a restaurant [Tr. 65] they drove around and discussed the arrangements that had been made. Due to the fact that Goldheimer had to make a court appearance and would not be able to return to Guadalajara on August 21, alternate arrangements had to be made and it was decided that Webster and Wilets would go to Mexico to receive delivery. Webster could then return to the United States on August 22 and Goldheimer could follow them down in order to transport the narcotics from Guadalajara to Ensenada [Tr. 66]. During the conversation Wilets wanted to know how the marihuana was to be packed and Walker said it was to be packed as tightly as possible and wrapped in water proofed containers so that just in case it was necessary to kick them overboard, it could be done although he (Walker) envisioned no problem. Walker also stated that he would be ready on 24-hour notice to meet Webster or Wilets or any of the co-conspirators at a pick-up point in Lower California. He asked for an advance of \$250 to defray the costs of renting a boat but he did not receive this sum. On August 18 Webster returned to Mexico driving to Tijuana with Wilets, then flying on to Guadalajara alone. But when he reached Guadalajara he did not find Mr. Wilson [Tr. 67] so he left by plane the next day for Puerto Vallarta where he located Wilson. Wilson would not return to Guadalajara with Webster as he stated that

he had to go to Yalapa and Webster then accompanied Wilson and his wife to that town. Webster inquired why nothing had been done and why no sample had been received and Wilson stated that he did not have the funds to stay in Guadalajara but that he had gone there anyway and found that the heroin which he thought was available was not available and that he had met with Medina concerning this and that he was returning to Yalapa to wait for a letter from Medina stating when the heroin was available [Tr. 68-69]. Wilson returned to Guadalajara with Webster where they met Agent Chappell of the Federal Bureau of Narcotics. Wilson told Chappell that he was sorry the deal hadn't gone off as originally scheduled and that he didn't think that it was quite finalized enough to convince the people from whom they were buying [Tr. 69]. Wilson said that now that Chappell and Webster were both back on the scene he (Wilson) would get everything rolling at once. Wilson suggested that he and Webster go back to the penitentiary to see Talaveras who was the contact man for Medina so that they could once again talk to Medina. Talaveras sent them to Medina and Wilson, Chappell and Webster had a discussion with Medina at a bar in Guadalajara [Tr. 70] in which Medina stated that he was sorry he hadn't made the delivery but that he didn't quite believe the whole thing was real and that he thought that somebody was just trying to get a kilo of heroin reserved in case he could raise the money; but that since the parties were on the scene Medina would be able to supply the heroin on one week's notice. Wilson inquired whether it would be possible to get the heroin before one week but Medina said they would have to get the opium from the fields and process it through their laboratory

to make the heroin and that it would take about a week [Tr. 71]. Wilson asked about the marihuana and Medina said that that was no problem and Wilson placed an order for 500 kilos which was to be delivered at the same time as the heroin. A meeting was arranged for two days later so that Chappell, Wilson, Webster and Medina could talk to the man who was the grower or rancher who supplied the opium. His name was Ochoa Mendez and the meeting was held at a hotel in Guadalajara at which meeting Wilson was not present [Tr. 72]. At this point counsel for Goldheimer objected to the introduction of evidence of the conversation at this meeting as not binding upon any one who was absent and the Court stated that it could only be binding upon anyone who was absent if it was connected up to show a conspiracy and that the indictment did allege that Medina and Mendez were members of the conspiracy [Tr. 73]. At the meeting Mendez told Chappell that he had the opium but that it would take about a week to make it into heroin. Chappell got into a disagreement with Medina and Mendez because they wanted Chappell, Wilson and Webster to go to Uruapan which was an Indian village about 100 miles from Guadalajara way up in the mountains because they were not too sure that the others were not Federal agents and they were worried about Federal agents in Guadalajara and also did not want to take the chance of being highjacked by the others. Chappell on the other hand took the position that he did not want to take the chance of being in a remote Mexican village with the money [Tr. 75]. It was finally decided that Wilson would go with Medina and Mendez to Uruapan and would accompany them to the ranch to inspect the narcotics. At this point there was an ob-

jection by defense counsel that the proceedings testified to were hearsay as to the appellants and the Court again gave cautionary instructions on the question of conspiracy [Tr. 76, 77]. At the meeting the delivery date was set for August 28 and Chappell and Webster were to wait in Guadalajara for a telephone call from Wilson which came late on the night of the 28th [Tr. 78].

On that night Chappell and Webster accompanied by Mexican narcotics agents drove to Uruapan. On the morning of the 30th they met Wilson in Uruapan and Wilson told Chappell that there were 500 kilos of marihuana and 15 kilos of opium at Mendez' ranch and that Mendez had brought five kilos of opium to Uruapan to show that group that the narcotics were available [Tr. 78, 79].

Webster, Wilson, Chappel and a Mexican narcotics agent then proceeded to a hotel room where Mendez and Medina were present [Tr. 80], Chappell requested to see the narcotics and Mendez left the room and returned with a raffia-type shopping bag which he put on the bed and from which he extracted a shoe box. Chappell looked at the contents and confirmed that it was opium then went in to brush his teeth, extracted a 38 caliber revolver from a handbag and placed Wilson, Medina and Mendez under arrest [Tr. 81]. The opium seized at that time weighed approximately two kilos [Tr. 82]. At the conclusion of this testimony Webster identified Walker in the courtroom as being the individual about whom he had testified [Tr. 83.]

Under cross-examination Webster testified that Goldheimer had given him his telephone number while they were in jail together in Long Beach [Tr. 84]; also re-

affirmed his testimony that when Goldheimer had shown him certain charts or maps on the yacht Pursuit he had displayed one to him and said "we have one all set up". Webster testified that he had contacted Goldheimer about a week after his release from jail at the number which Goldheimer had given him in jail [Tr. 112]. As to his discussion with Wilets, he stated that Wilets specifically instructed him to appear to go along with Goldheimer "but not to lead him". He was told to contact Goldheimer but was instructed to "let them make the first move" [Tr. 112-113]. He reaffirmed his testimony on direct that whenever he was together with Goldheimer and Walker the conversation was generally about narcotics even at the first meeting which he had with Walker [Tr. 117]; and that at their first meeting during a discussion of narcotics, marihuana was present in Walker's automobile and Walker and Goldheimer were smoking marihuana cigarettes [Tr. 119]. Webster stated that he was told by agent Wilets after he had described the conversations which he had with Goldheimer and Walker that "if there is a conspiracy I am to go along with it; but that I wasn't to attempt to build a case" [Tr. 138].

Donald P. Wilets testified that he had been an agent with the Federal Bureau of Narcotics for three years [Tr. 161]; identified Walker and Goldheimer in the courtroom [Tr. 164] and testified that he first saw them on June 23, 1960, and first met Goldheimer on July 13, 1960, at the Scandia Restaurant when he was introduced to him by Webster [Tr. 165]. After dinner Goldheimer explained to Wilets the connections which he had in Mexico and his idea for bringing narcotics from Mexico into the United States. Wilets represented

himself to Goldheimer as a well-to-do individual who was acquainted with the narcotics traffic and Goldheimer told Wilets that he had a friend in Mexico with whom he had dealt before and who was acquainted with narcotics sources in Mexico and had narcotics readily available and that the proposed plan was to bring 200-400 kilograms of marihuana back from Guadalajara to a point near Ensenada where the narcotics would be loaded on a boat which would sail to the United States [Tr. 170, 171]. Walker's name was brought into the conversation several times concerning his part in taking care of the boat and handling the details of getting the boat to Ensenada [Tr. 172]. Wilets indicated that he was willing to back Webster [Tr. 173]. When Wilets asked Goldheimer if he wanted any money "out front" Goldheimer stated that he was well financed and didn't need it [Tr. 174].

On July 14, 1960, Wilets and Webster met Goldheimer and Walker at a place called the Palms Bar [Tr. 176]. The four individuals left the bar and drove in Wilets' car and during a discussion pertaining to the proposed operations, Walker asked Wilets if he was going to front any money on the operation to which Wilets replied that he would pay for the narcotics only when they were delivered in the United States and he would put no money out across the border [Tr. 182]. Wilets testified that he told Webster over the phone when Webster called him from Guadalajara that Webster was to call him often but that he was "to let Goldheimer lead, not to try to take over himself" [Tr. 180]. While walking out to the plane at the airport Goldheimer asked Wilets if he could use any opium, any "mud", and Wilets replied that he

would see what he could do to get rid of opium for him [Tr. 191]. During the drive back from the airport upon the return of Webster and Goldheimer from Mexico, Goldheimer discussed the purchase of the kilo of heroin and told Wilets that the heroin would be available from either the 8th or 14th through the 21st and that the kilo would be waiting in Guadalajara and that he wanted to make the purchase at one time together with the marijuana [Tr. 193.] Goldheimer also explained in detail the procedure in the Mexican jail and how they had been able to get in to see Talaveras and Ramundo. Before leaving the car to go to his apartment, Goldheimer told Wilets that he could consummate the deal within fifteen days [Tr. 195]. Wilets testified that an electronic recording device had been installed in the car and that the entire conversation during the car ride had been recorded on tape. These tapes were identified as Exhibits 1A, 1B and 1C and were later introduced into evidence [Tr. 199]. The next meeting with Goldheimer and Walker occurred on August 10, 1960, at the Pancake Parade Restaurant [Tr. 199]. They left the restaurant and entered Wilets' car and discussed the transactions while driving around. Goldheimer stated that he would not be able to leave for Mexico until the 22nd at the earliest because of a court appearance but he was against Wilets and Webster leaving and going down there without him because he said that Bryce Wilson might not deal with them [Tr. 202]. Goldheimer stated that he had "made all the connec-

tions" and that Wilson was his personal friend and that he wanted to be down there when any transactions took place or any business was taken care of [Tr. 203]. Walker stated that the boat which he had originally planned to use was not available and that he would have to go out and charter a boat but that he was short of funds and needed approximately \$250.00 to handle the chartering fees [Tr. 205] and he told Wilets that he wanted the narcotics water proofed but not weighted because he didn't expect any trouble but the narcotics might get wet from the normal sailing of the boat [Tr. 206].

At the time the foregoing discussions were conducted in Wilets' car they were being recorded on a tape recorder which Wilets had placed in the car. The recordings were identified and introduced into evidence as Government's Exhibits 2A, 2B and 2C [Tr. 210]. On September 5, 1960, Wilets met Goldheimer in a restaurant by pre-arrangement and he intended to place Goldheimer and Walker under arrest at that time but Walker was not with Goldheimer and Goldheimer explained that he had not been able to contact Walker who was working on the Pursuit at a boat repair dock [Tr. 211]. Wilets did not place Goldheimer under arrest on that day but on September 9 he met with Goldheimer and Walker in Goldheimer's apartment at the Normandy Village Apartments in Hollywood where he told Goldheimer and Walker that the narcotics had been moved to Ensenada and sent Tingy, another agent who accompanied Wilets to Goldheimer's apart-

ment, out to get the map supposedly showing the location of the narcotics [Tr. 212]. Tingy returned to the apartment with several other agents and Walker and Goldheimer were placed under arrest [Tr. 213].

On cross-examination Wilets stated that Webster related Goldheimer's scheme to him on June 4, 1960, and asked if he were interested in Webster's following through on the scheme to which he replied in the affirmative [Tr. 218-219]. Wilets explained that the reason he did not meet Goldheimer until July 13 at Scandia was that he requested Webster to find out the name of the second participant involved [Tr. 219]. Wilets again explained the plan which Goldheimer submitted to him at the Scandia Restaurant at the first meeting which was that Wilson, a friend of Goldheimer's, would be able to supply about 200 kilos of marihuana and that Goldheimer intended to go down to get the marihuana, drive it to the vicinity of Ensenada from which point the narcotics would be loaded on a boat to be sailed back to Newport Harbor by Walker [Tr. 225-226]. Wilets stated that at the meeting at the Palms Cafe on July 14 with Walker and Goldheimer there was no mention of any financing but during the ride in the car after leaving the restaurant, Walker asked him if he was going to front any money on the operation to which Wilets replied that he would not give any money until the narcotics were in the United States [Tr. 227-228]; and that on the evening of August 10 at the Pancake Parade Restaurant in

Long Beach he requested \$250.00 for funds for chartering a boat [Tr. 229-230]. Wilets stated that Goldheimer and not Webster had proposed the trip to Mexico [Tr. 240].

Howard W. Chappell testified that he had been an agent of the Federal Bureau of Narcotics for thirteen years and was presently in charge of the Los Angeles office [Tr. 262-263]; that he arrived in Guadalajara August 19, 1960 [Tr. 263]; that he was introduced to Wilson by Webster in Guadalajara [Tr. 266]; and that Wilson stated to him that the weed was set to go but that they couldn't get the heroin because the people got rid of the heroin and they'd have to wait a week or so for them to convert some more [Tr. 267]. Wilson stated that the marihuana could be ready tomorrow or at the latest in 48 hours and asked where Goldheimer was to which Chappell replied that Goldheimer had to be in trial on the following day and couldn't come down. Wilson asked "Well is Walker going to have the boat at Ensenada?" [Tr. 268]. Chappell replied that all arrangements were made and that as soon as he had seen and had possession of the stuff he would call Los Angeles and the boat would leave for Ensenada. Arrangements were made to go to a suburb of Guadalajara called Tlaquepaque the following morning where an attempt was made to locate Nicolas Medina but he could not be located there so Wilson and Chappell went to Puerto Vallarta on August 23 [Tr. 272]. Wilson had stated to Chappell

that he knew Walker fairly well and that he had met him the previous year when the Pursuit had made a trip to Ensenada [Tr. 273]. They returned to Guadalajara on August 24 where they met Medina [Tr. 274]. Medina told Chappell that the price of heroin was \$12,000 instead of the \$10,000 originally quoted and said that they would have to wait until they brought the opium down from the mountains and converted it into heroin before they could get it but that the marihuana could be available immediately [Tr. 275]. On the next day, August 25, 1960, Chappell and Wilson again met with Medina and Francisco Ochoa Mendez in a motel in Guadalajara [Tr. 276]. Mendez was introduced as the grower of the opium and there was a discussion about the price and where the narcotics would be delivered; Chappell wanted it delivered in Guadalajara but Mendez insisted that delivery should be made in a village called Uruapan which was about 300 miles away [Tr. 277]. It was finally agreed that Wilson would go with Mendez to Uruapan and when they had the marihuana and opium all loaded in the truck to call Chappell in Guadalajara where he would meet Mendez and pay the money. Wilson went to Uruapan with Mendez and on the 29th of August Chappell received the call and proceeded to travel to Uruapan by automobile with Webster and two Mexican narcotics agents [Tr. 278-279]. Upon arriving in Uruapan they met Bryce Wilson who told them that Mendez and Medina were in a hotel in town [Tr. 280]. Wilson went to the hotel to join Medina and Mendez and some

time later they were joined by Chappell who asked to see a sample of the opium [Tr. 281]. Mendez went out to get the sample and he showed it to Chappell upon his return [Tr. 282] at which time Chappell took a pistol out of his bag and arrested Mendez, Medina and Wilson [Tr. 283].

Eugene Duvalcourt Walker testified in his own defense and admitted that he might have discussed with Goldheimer the laxness in customs inspection for private yachts returning from Mexico [Tr. 312]; that he joined in a conversation regarding narcotics with Goldheimer and Webster at the Pancake House on June 23, 1960; that he asked Wilets if he was going to put up front money or finance the operation completely and that there was a discussion of bringing marihuana and heroin into the United States during a car ride from the Pancake House Restaurant [Tr. 338]. He also admitted that there was a discussion of a trip to Mexico to secure knowledge of where narcotics could be obtained and in what quantity on July 14 in the vicinity of the Palms Restaurant [Tr. 341]; that Bryce Wilson was mentioned as a source or contact man in that connection [Tr. 342]; and that he may have met Wilson in Yalapa after his return from Acapulco some time before [Tr. 342]. Walker also admitted that prior to August 10 he had made inquiries about boats that would be available for hire and charter as he was supposed to be "getting a boat ready" for the operation but that he had not contracted for one up to that time; and there was a discussion as to waterproofing

bags in which narcotics would be packed [Tr. 348] and that he had been told that he would have to go somewhere in the vicinity of Ensenada but no specific point had been mentioned [Tr. 354]. Walker stated that he knew that the plan into which he entered for importing narcotics with Webster and Goldheimer was against the law but that he agreed to enter into it because it would bring him profit [Tr. 357-358].

Irving Goldheimer testified in his own defense, denied that narcotics had been discussed with Webster in the city jail in Long Beach at their first meeting [Tr. 363-364] but admitted that it was discussed at a subsequent meeting where he told Webster that he had been to Mexico and knew a few people down there [Tr. 371, 372, 374]. Goldheimer also stated that after he reached Guadalajara with Webster he did make an effort to find Wilson and that he located him in Puerto Vallarta [Tr. 381]. Goldheimer stated that there had been a discussion with Webster and Wilets about the method of transporting narcotics from Guadalajara to Los Angeles at the time he was being driven back in Wilets' automobile from the airport on his return to Los Angeles from Mexico [Tr. 387-389].

At the conclusion of Goldheimer's testimony both sides rested and at the next session of court the jury was instructed and retired [Tr. 405-436]. It should be noted that the Court inquired of both sides as to whether they were satisfied with the instructions and both sides stated that they were satisfied to have the case submitted on the instructions as just given by the Court [Tr. 436].

IV.

STATEMENT OF QUESTIONS PRESENTED.

Appellants submitted two separate opening briefs but an analysis of their contents indicates that there are several questions raised and arguments made which are common to both briefs and that the Walker brief raises certain additional matters that are not touched upon in the Goldheimer brief.

The following arguments are made in both briefs and in essentially similar fashion:

(1) The appellants were unlawfully entrapped into committing the crimes of which they were convicted and the court should so have held as a matter of law;

(2) The court committed error during its instructions in its comment on the law relating to entrapment and the appellants were denied a fair trial as a result thereof;

(3) The court erred in admitting the testimony of Agent Chappell concerning his activities in Mexico.

The following additional arguments are made by appellant Walker:

(1) the evidence was insufficient to establish his guilt;

(2) the court committed error in refusing to consider a juror's affidavit in connection with his motion for a new trial.

The five matters summarized above will be discussed in their respective order in *V infra*.

V.

ARGUMENT.

A. The Evidence Does Not Indicate That There Was Entrapment as a Matter of Law and the Trial Court Properly Submitted the Question of Entrapment to the Jury for Its Consideration.

Appellants rely primarily on the opinions in two leading Supreme Court cases² to support their argument.

The Government supports the guiding principles of the law of entrapment as set out in those opinions; our disagreement with the appellants—"the parting of the ways"—concerns the appropriateness of their application to the instant case.

The *Sorrells* case sets forth the general considerations to be employed in all cases where entrapment is in issue. The Court there said:³

"It is well settled that the fact that officers or employees of the Government merely afford opportunities or facilities for the commission of the offense does not defeat the prosecution. Artifice and stratagem may be employed to catch those engaged in criminal enterprises. (Citing cases). The appropriate object of this permitted activity, frequently essential to the enforcement of the law, is to reveal the criminal design; to expose the illicit traffic . . . and thus to disclose the would-be violators of the law. A different question is presented when the criminal design originates with

²*Sorrells v. United States*, 287 U. S. 435 (1935); *Sherman v. United States*, 356 U. S. 369 (1958).

³*Sorrells supra* at p. 442.

the officials of the Government, and they implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that they may prosecute”.

In *Sorrells* the Supreme Court reversed the conviction holding that the District Court was in error in “holding that as a matter of law there was no entrapment and in refusing to submit the issue to the jury” (*supra*, p. 452).

Here, the trial court did submit the issue to the jury under the principles enunciated in *Sorrells* and it is submitted that an analysis of the record, here, as made below, indicates that *Sorrells* serves to support this submission and the subsequent determination of the jury.

As to *Sherman supra*, it is apparent that the decision therein that the trial court should have held entrapment present as a matter of law, does not have application here because the circumstances, in the two cases are so radically different. Rather the case which does parallel the instant case, one which bears a striking similarity in its facts and is therefore more applicable is the *Masciale* case,⁴ which was decided by the Supreme Court on the same day as the *Sherman* case.

In the instant case there were no attempts on the part of the appellants to avoid the issue of narcotics, no repeated refusals to discuss narcotics, no appeals to sympathy by one supposed addict (the informer) to another (the defendant) who was attempting to cure himself of the habit and no gradual wearing down of the

⁴*Masciale v. United States*, 356 U. S. 386 (1958).

defendant's resistance, all of which occurred in *Sherman*. As the court stated there, in holding that entrapment was established as a matter of law, it was not choosing between conflicting witnesses, nor judging credibility; but it was reaching its conclusion from the undisputed testimony of the prosecution's witnesses.

Contrast the situation in *Sherman* with that present in the instant case and in *Masciale, supra*. Here, as in *Masciale*, at least one of the appellants, Goldheimer, was acquainted with the special employee without knowledge that he was working as an undercover agent [Tr. 5, 11]. Also in both cases, the Government agent (Wilets in this case, an individual named Marshall in *Masciale*) was introduced as a big money man interested in talking about and buying very large quantities of high grade narcotics [Tr. 165, 170, 171]. Here, as also in *Masciale*, the appellants could have withdrawn from the conversations and refused to conduct any further meetings with the special employee or with the Government agent but instead of withdrawing, the appellants had additional meetings [Tr. 176, 193], and further conversations in which one of the appellants, Goldheimer, discussed his "contacts" in Mexico and his plan to smuggle the narcotics into the United States [Tr. 170-171] and the other appellant, Walker, agreed to accept his position in the conspiracy as the water transportation specialist who could set forth the manner in which the narcotics should be packed and where it would be stored during the voyage [Tr. 199] and even requested funds from one of the others who was supposed to participate so that he could have some money to charter a boat for the illegal expedition [Tr. 205, 206].

On the facts in the record, where did the “criminal design” originate? Was it the Government employees or appellant Goldheimer who had the “contacts,” co-conspirator Bryce Wilson and other in Mexico, who knew in what town to find Wilson and who had money on deposit with him in Mexico and who evolved the plan—the way the “Hollywood people” do it—to smuggle the narcotics into the United States? And was it the Government agents or appellant Goldheimer who knew of the sailing abilities of Walker and induced Walker to join the conspiracy? And was it not Walker who because of his observation of the laxness of customs officials in inspecting private pleasure vessels, conceived a plan of smuggling narcotics into the United States by wrapping them in water proof bags and placing them in the sailing bags of such vessels [Tr. 205-206]? The record indicates that Walker volunteered to further study the customs procedures so that the plan would be fool proof [Tr. 26].

The appellants testified on their own behalf but it is submitted that a review of the record indicates that the trial court had sufficient justification for concluding that entrapment was not established as a matter of law but that it should be presented as a question of fact for determination by the jury.⁵

This court has repeatedly decided, in accordance with the holding in *Masciale supra*, that when the issue of entrapment is present and there is conflicting testimony and credibility factors involved, the trial court properly fulfills its function, when as in this case, it

⁵It should be noted that many of these prosecution conversations were recorded and admitted into evidence as Exhibits 1 and 2.

submits the matter to a jury; and that after it does so, the jury is entitled to disbelieve the evidence offered by the defense, find that the “criminal design” originated with the defendant or defendants and thus find for the Government on the issue of the defendants’ guilt, as it did here.

See:

Matthews v. United States, 290 F. 2d 198 (1961);

Young v. United States, 286 F. 2d 13 (1960);

Hattem v. United States, 283 F. 2d 339 (1960);

Cellino v. United States, 276 F. 2d 941 (1960);

Bruno v. United States, 259 F. 2d 881 (1948).

B. The Court’s Instructions on Entrapment Did Not Deprive the Appellants of a Fair Trial.

Appellants now complain of some of the language in the trial court’s instructions concerning entrapment, but it should be noted that no exceptions were taken to any of the instructions before the jury retired for its deliberations.

Rule 30, Title 18, Federal Rules of Criminal Procedure, provides in pertinent part as follows:

“ . . . No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objections. . . .”

In this case after the trial court had instructed the jury [Tr. 405-437], the Court inquired of the appellants whether there were any matters which either side

wished to take up before the jury finally retired to deliberate on the verdict and whether the appellants were satisfied to have the case submitted at that time, and the appellants replied that they had no further matters to take up and that they were satisfied to have the case submitted at that time [Tr. 436].

It would seem therefore that because of their failure to take exception at the time, the appellants are now barred by the operation of Rule 30, *supra*, from objecting to any portion of the Court's instructions.

It should be noted that the rule was designed to permit the trial court to correct any instructions if erroneous and thus to obviate the necessity for a new trial, and thus if appropriate and seasonable objection had been made, the court could have told the jury to disregard or further explain the comments to which the appellants now object.

See:

Federick v. United States, 163 F. 2d 536, 19th Cir. (1947), cert. den., 332 U. S. 775 (1947).

The appellants do not invoke the "plain error" rule,⁶ but it should be noted that even if the court's instructions were to be re-examined they should be re-examined in their entirety—words or phrases should not be examined piecemeal or in isolation (see *Johnson v. United States*, 291 F. 2d 150 (8th Cir. 1961), and that when the entire instruction concerning the law of entrapment is so examined [Tr. 426-430], it is couched in the guiding principle of the *Sorrells* case, *supra*, and results in no prejudice to the appellants.

⁶Title 18, Federal Rules of Criminal Procedure, Rule 52(b).

C. The Testimony of Agent Chappell Was Properly Admitted Into Evidence.

It would appear that two questions are involved concerning the admissibility of testimony of Agent Chappell [Tr. 262-287], as raised by the appellants; one concerns the time of the occurrences related by the witness, the other as to the occurrences themselves.

First, as to the matter of time—it should be noted that Chappell's testimony concerned events which terminated on August 29, 1960, with the arrest of three of the unindicted co-conspirators, Bryce Wilson, the American living in Mexico, and the two Mexican nationals, Medina and Mendez [Tr. 283]. It should be noted further that the indictment alleges a conspiracy which continued to August 30, 1960, so that all of Chappell's testimony relates to a period covered by the indictment. It should further be noted that the evidence does not indicate that the appellants had withdrawn from the conspiracy or that the conspiracy had terminated by August 29, 1960—contrarywise, on September 5, 1960, appellant Goldheimer met with Wilets in Los Angeles to discuss the status of the operation [Tr. 211] and four days later on September 9, 1960, the day of their arrest, appellants Goldheimer and Walker met with Wilets to discuss and plan the final phase of the operation [Tr. 212-213], still unaware of course that Wilets was a federal officer.

It is apparent therefore that the time on which the events testified to by Chappell occurred, offered no bar to their reception into evidence.

Now, as to the testimony itself: It should be noted that before permitting Chappell to testify, the Court instructed the jury as to the pertinent law relating to

a conspiracy [Tr. 265], and in its charge gave additional detailed instructions relating to conspiracies [Tr. 421-428].

It is well settled of course, that every act or declaration of each member of a conspiracy in furtherance thereof, and while the conspiracy is in operation, is considered the act of declaration of each member of that conspiracy. See *Barnett v. United States*, 171 F. 2d 721 (9th Cir. 1949).

If we examine the testimony of Chappell, we discover that he was introduced to one of the co-conspirators (Wilson) in Guadalajara [Tr. 266] and that from that point on the testimony concerns mainly admissions and declarations made by Wilson or the other unindicted co-conspirators to him concerning the operation for which the conspiracy was formed. For example, that the weed was set to go, etc. [Tr. 267], when the marihuana would be ready and the activities of Walker and Goldheimer [Tr. 268], arrangements to go to another town for a meeting with the Mexican members of the conspiracy [Tr. 272]. From that meeting until the arrests, Chappell's testimony is concerned almost entirely with the actions and declarations of the Mexican co-conspirators in addition to those of Wilson [Tr. 278-283, *Passim*].

In line therefore with the admonition by the Court and the instructions relating to the law of conspiracy it was proper to admit the Chappell testimony so that the jury could consider the actions and declarations of the co-conspirators, only after a finding by it of course that a conspiracy did in fact exist. (See the Court's instructions relating to formation of a conspiracy and effect to be accorded to acts and declarations of those

found to be members thereof [Tr. 423-424] and see *Sanchez v. United States*, 293 F. 2d 239, 244 (9th Cir. 1956).

D. The Evidence Was Sufficient to Support a Finding of Guilt as to Appellant Walker.

A review of the record indicates that appellant Walker was actively interested in participating in the plan to smuggle narcotics into the United States; that he was to perform one of the vital functions in the conspiracy, that of providing the transportation and transporting the narcotics into the United States and that he at no time withdrew from his participation in the conspiracy (see transcript references *re* appellant Walker in section A *supra* relating to the entrapment issue).

It is apparent therefore that there was sufficient evidence to submit to the jury concerning Walker's participation and role in the conspiracy and it is well settled that on review, the evidence must be viewed in the light most favorable to support the judgment. See *Glasser v. United States*, 315 U. S. 60 (1941).⁷

E. The Court Correctly Refused to Consider a Juror's Affidavit in Connection With the Application of Appellant Walker for a New Trial.

The general rule in the federal courts is that testimony of a juror may not be received to prove misconduct by himself or his colleague in reaching a verdict.

⁷Actually appellant Walker in his brief at p. 27 admits that he entered into a "purported conspiracy to import narcotics into the United States" but again makes a claim of entrapment so that this point is actually a repetition of his argument outlined in A *supra*.

Jordan v. United States, 87 F. 2d 64 (D. C. Cir. 1936) and *Rotondo v. Isthmian Steamship Lines*, 243 F. 2d 581 (2nd Cir. 1957), are two cases in which this was held to be the rule in circumstances just as in the instant case where allegations were made that the jury failed to follow the Court's instructions in arriving at its verdict.

In the *Rotondo* case *supra*, at page 583, in a *per curiam* opinion by a court composed of Judges Hand, Medina and Waterman, there appears this statement of the law:

"The motion wholly misconceives the law relating to this subject. There have indeed been cases where the Court has set aside a verdict because evidence was brought before the jury *outside of court* (emphasis supplied). *Mattox v. United States*, 146 U. S. 140, 13 S. Ct. 50, 36 L. Ed. 917 is the leading decision upon that point. *However it is completely well settled that when objection rests upon the jurors' testimony as to what were the reasons that in fact induced them to find their verdict, the court will not hear them.*" (Emphasis supplied.)⁸

That is not indeed because the verdict would or could survive the facts if they were disclosed; but because the law will not permit a decision to be

⁸In its footnote at this point, the court cites the following cases, thusly: "*Hyde v. United States*, 225 U. S. 347, 383, 384, 32 S. Ct. 793, 56 L. Ed. 1114; *Clark v. United States*, 289 U. S. 118, 53 S. Ct. 465, 77 L. Ed. 993; *Stein v. People of the State of New York*, 346 U. S. 156, 178, 73 S. Ct. 1077, 97 L. Ed. 1522; *Jorgensen v. York Ice Machinery Corp.*, 2 Cir., 160 F. 2d 432, 435; Wigmore § 2349."

reopened to which all have assented. Wigmore likens the situation to that that refuses to consider parol evidence to vary a written instrument.

In *Stein v. New York* (cited in footnote 8 *supra*) the Supreme Court stated, at page 178:

“Nor have the courts favored any public or private post-trial inquisition of jurors as to how they reasoned lest it operate to intimidate and harass them. This court will not accept their own disclosures of forbidden quotient verdicts in damage cases, *McDonald v. Pless*, 238 U. S. 264, nor of compromises in a criminal case whereby some jurors have exchanged their convictions on one issue in return for concession by other jurors on another issue. *Hyde v. United States*, 225 U. S. 347. If evidence thus secured could be thus used, the result would be to make what was intended to be a private deliberation, the constant subject of public investigation—to the destruction of all frankness and freedom of discussion and conference. *McDonald v. Pless*, *supra*, at 267-268.

But the inability of a reviewing court to see what the jury has really done is inherent in jury trial of any two or more issues and departure from instruction is a risk inseparable from jury secrecy and independence. The uncertainty, while the cause of concern and dissatisfaction in the literature of the profession, does not render the customary jury practice unconstitutional.”

It should be well noted at this point that the juror's affidavit which appellant Walker attempted to introduce in connection with his motion did not concern any

extrinsic matters or pressures on the jury which occurred outside of court, but were concerned with their method of deliberation, that is with an alleged misconception of the instructions of the court, which is the same matter to which the court addressed itself in *Rotondo, supra*.

In conclusion, there follows a brief, succinct statement of the law as it appears in *Jordan v. United States, supra*:

“To set aside the verdict now on the ground of mistake on the part of the jury would we think be improper and as is often said in like circumstances, to establish a practice replete with dangerous consequences.

“The universal rule in the federal courts is that the testimony of a juror may not be received to prove misconduct of himself or his colleagues in reaching a verdict.” (Citing cases.)

Conclusion.

Appellee urges, that for the reasons herein discussed, the convictions of the appellants in the trial court should be affirmed.

Respectfully submitted,

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THOMAS R. SHERIDAN,
Assistant U. S. Attorney,
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No. 17385 ✓

United States
Court of Appeals
for the Ninth Circuit

TECHNICAL PUBLICATIONS INSTITUTE, and
the owners and operators thereof, and FRANK
CSASZAR, its manager,

Appellant,

vs.

STANLEY MOSK, Attorney General of the State of
California,

Appellee.

Transcript of Record

Appeal from the United States District Court for the
Southern District of California,
Central Division

FILED

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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In the United States District Court
Southern District of California
Central Division

No. 1381-60-Y

TECHNICAL PUBLICATIONS INSTITUTE and
the OWNERS AND OPERATORS THERE-
OF, and FRANK CSASZAR, ITS MANAGER,
Plaintiffs,

vs.

STANLEY MOSK, ATTORNEY GENERAL OF
THE STATE OF CALIFORNIA, and THE
STATE OF CALIFORNIA,
Defendants.

PETITION FOR STATUTORY THREE-JUDGE
COURT, FOR INJUNCTION AGAINST THE
ENFORCEMENT OF STATE STATUTES
OF THE STATE OF CALIFORNIA ON THE
GROUNDS THAT THEY CONFLICT WITH
THE CONSTITUTION OF THE UNITED
STATES AND STAY OF STATE COURT
PROCEEDINGS

Jurisdiction

Jurisdiction is conferred under Sections 2281, 2283
and 2284 of Title 28, United States Code and Title
28, Section 2201 United States Code.

This action involves the constitutionality of Sections
29001 to 29020 of the Education Code of the State of

California and Sections 11183 to 11188 of the Government Code of the State of California, inherently and as construed and applied in this case, as being in conflict with the First, Fourth, Fifth and Fourteenth Amendments to the Constitution of the United States, and Article One, Section 10 of the Constitution of the United States, and whether the plaintiffs are denied due process and equal protection of the laws, as guaranteed by the Fourteenth Amendment to the Constitution of the United States.

The case also involves an actual controversy between the plaintiffs and the Attorney General of the State of California as to the plaintiffs' rights and duties as construed in the light of the Constitution of the United States in its First, Fourth, Fifth and Fourteenth Amendments to the Constitution of the United States.

It also involves a legal controversy between the plaintiffs and defendants as to whether Section 29001 of the Education Code, inherently and as construed and applied in this case, is too vague and indefinite and uncertain as to constitute a basis for criminal punishment.

It also involves the issue of whether the plaintiffs, who operate an extensive publication and writing business in the State of California by mail throughout the world and publish and distribute educational courses of instruction regarding technical writing, are denied the equal protection of the laws as regards schools in other states, engaged in similar instruction, in violation of the equal protection clause of the Fourteenth Amendment to the Constitution of the United States.

Jurisdiction is also asserted to declare the rights and duties of the state to limit and censor and control and supervise education through the oblique method of calling for information regarding diplomas in subpoenas duces tecum.

The State of California in its Superior Court has upheld the power of the Attorney General to conduct investigations and to compel petitioners to respond to subpoenas duces tecum and the District Court of Appeal and the Supreme Court have declined to issue their appropriate Writs of Prohibition and Mandate, or any other appropriate Writs; the Honorable B. Rey Schauer voting for a hearing. Thus the highest court of the state has upheld the constitutionality of the statutes and the procedure and proceedings involved.

Plaintiffs assert damage and injury in excess of \$10,000 by reason of the attempted investigation and publicity resulting therefrom. They further assert that the names and addresses of their students and graduates are trade secrets worth at least a quarter of a million dollars and that compelling them to give them up would cause losses in excess of \$10,000 to competitors and others.

First Count and Claim

Jurisdiction is conferred under Sections 2281, 2283 and 2284 of Title 28, U. S. Code, which confers upon a United States Court consisting of a statutory three-judge court, jurisdiction to enjoin the enforcement of an unconstitutional statute of a state on the grounds of its being in conflict with the Constitution of the United States.

1. Damages and loss in excess of \$10,000 by reason of the state's attempted enforcement of the unconstitutional statute of the State of California have occurred and continuing damage in excess of \$10,000 is occurring by reason of the action of the Attorney General of the State of California.

2. Technical Publications Institute and the owners and operators thereof publish and circulate privately, and for compensation, a series of courses of instruction in the range of technical materials in such subjects as airplanes, relating to the technical and mechanical engineering and devices thereof and to engineering and technical matters of a like nature. It is a private school with its main offices and facilities located at 6399 Wilshire Boulevard in the City of Los Angeles, County of Los Angeles, State of California, and within the jurisdiction of the District Court of the United States, Southern District of California, Central Division. Its operations and the giving of its courses extend nationwide and even throughout other parts of the world.

Its staff consists of 8 and sometimes 9 teachers or instructors, who examine lessons and writing material of students who take its courses.

It publishes and disseminates 3 different types of lessons or instructions. One of these courses consists of 40 lessons in general technical writing materials. It is useful in the various technical crafts, particularly airplanes, missiles, electronics and other scientific materials. It has another course consisting of 56 lessons concerning the writing of materials for engineering and in the field of engineering and it has a third

course, consisting of 40 lessons, in drafting for technical or scientific purposes.

The Institute was founded in 1954 to supply technical writing knowledge widely needed in the professional field to which it seeks to implant this knowledge and its subjects are not rightly taught in public schools. It has no relation or connection with any public school. It is not necessary for those who enroll in Technical Publications Institute courses or buy its publications to have high school credit or a high school diploma, or its equivalent, before taking up the courses of instruction or purchasing the series of courses. Before the course is given to students they are given an aptitude test by the private school itself, which accepts or rejects the application upon the outcome of the private examination.

A contract is entered into usually with the person purchasing the publications and enrolling in the school. A fee is involved in the giving of the particular instructions and the purchase of the publication material. These contracts are generally installment contracts although students may purchase and pay for the course outright if he or she so wishes.

The school has widely advertised its courses and has branches in various and numerous other cities and states of the United States. It has thereby enrolled students. The student list and their names and addresses are a very valuable asset not only to the school but could be, in time of national emergency, a great asset to the Department of Defense. The lists are considered the private property of Technical Publica-

tions Institute and are estimated to have a value of more than a quarter of a million dollars.

The school has an enrollment of more than 2500 students outside the state and has an enrollment of approximately 2445 students, more or less, within the state. The approximate appraisal of the valuation of the school as of May 1960 was \$1,290,000.

Because of the attempted investigation of the Attorney General, the proceedings herein sought to be enjoined, the valuation of the school is less than \$1,000,000 and unless an injunction is issued the Institute may be entirely and totally destroyed.

The school has rival institutions engaged in the same line of endeavor, of which there are approximately 5 in the Judicial District of the Southern District of California, Central Division. There are other institutions throughout the United States engaged in similar instructions. The availability of student lists to other institutions would cause great and irreparable damage and injury and would make available to persons not authorized to have them people who are qualified in the technical knowledge and skill in the subjects taught.

3. The publication material of Technical Publications Institute is in no way in violation of any law, obscene or otherwise objectionable from this standpoint and standards of technical knowledge and publication.

The Institute does not require a high school credit or high school diploma or its equivalent nor does it seek any benefits from any state or public institution, schools or colleges of the State of California.

The students who complete the courses are entitled to a certificate stating that they have satisfactorily completed the courses taken. They do not purport or seek to entitle the holder to any college or high school credit, nor is it claimed or asserted that such certificate entitles them to any such college or high school credit nor that it is comparable or equal to any high school or college course involving any subject which may be the same or similar, if there is any such high school or college courses, or that there is any such high school or college course or courses of the same or similar subjects.

On May 11, 1960 the Attorney General of the State of California, by a Deputy Attorney General, Norman Epstein, caused to be served upon Technical Publications Institute and Frank Csaszar, its manager, a subpoena duces tecum ad testandum purporting to come from the Department of Justice, Office of the Attorney General, to appear May 12, 1960 at 3:30 p.m. and bring with him the following described books, written records, documents and other material:

“Authority to Conduct Investigations and to Hold Hearings in Connection Therewith.

“State of California Department of Justice

“Office of the Attorney General

“Pursuant to provisions of Section 11182 of the Government Code of the State of California, I hereby authorize Elizabeth Miller and Norman L. Epstein of the Department of Justice of the State of California, to conduct an investigation into the Technical Publications Institute, its activities, owners and operators, in

order to determine whether said institute or the owners and operators thereof, have issued or conferred any diploma or honorary diploma in violation of Article 1, Chapter 8, Division 20, Part 4 of the Education Code composing Sections 29001 to 29022, inclusive thereof.

“Dated: This 21st day of March, 1960.

“STANLEY MOSK,
“Attorney General of the
State of California.”

“Subpoena Duces Tecum Ad Testandum

“State of California Department of Justice
Office of the Attorney General

“In the Matter of the Investigation of Technical Publications Institute, and the Owners and Operators thereof.

“The People of the State of California Send Greetings to:

“Barnarr R. Cannon, Marie T. Cannon, Frank Csaszar, Patrick S. Mitton, Technical Publications Institute, Technical Publications Institute, Inc., a corporation, Technical Publications Investment Corporation, a corporation, and B. R. Cannon, Inc., a corporation.

“Pursuant to the authority vested in me by the laws of the State of California:

“You are hereby commanded to appear before the Attorney General of the State of California, or his duly authorized representative, at 217 W. First Street, Room 4020, Los Angeles, California, on the 11th day of May, 1960, at the hour of 11:00 o'clock a.m., and to continue in attendance before him at such times and

places as he may determine and to testify in the above entitled matter.

“You are further commanded to bring with you and produce the following described books, written records, documents and other material:

“The names and addresses, both local and home, including city and street, of each of the students of Technical Publications Institute, Technical Publications Institute, Inc., Technical Publications Investment Corporation, and B. R. Cannon, Inc., who have been students at any time from and after July 23, 1958, to and including the present:

“The number of diplomas and honorary diplomas granted by Technical Publications Institute, Technical Publications Institute, Inc., Technical Publications Investment Corporation, and B. R. Cannon, Inc., together with the names and addresses of the persons to whom each was granted and the date upon which each was granted, and the curricula upon which each diploma was based; the courses of study offered by Technical Publications Institute, Technical Publications Institute, Inc., Technical Publications Investment Corporation, and B. R. Cannon, Inc., at any time from on or after July 23, 1958 to and including the present.

“The names and addresses, including city and street, of every person who has instructed for or at Technical Publications Institute, Technical Publications Institute, Inc., Technical Publications Investment Corporation, and B. R. Cannon, Inc., from on or after July 23, 1958 to the present, together with the record of the educational qualification of each.

“For failure to comply with the provisions of this subpoena and to attend as required you will be subject to contempt proceedings in accordance with the provisions of Section 11188 of the Government Code of the State of California.

“Given under my hand this 19th day of May, 1960.

“STANLEY MOSK,

Attorney General

“/s/ By NORMAN L. EPSTEIN,

Deputy Attorney General”

To this purported subpoena duces tecum of the Attorney General, Frank Csaszar, as manager of Technical Publications Institute, responded with a motion to quash the same upon the grounds, among others, that Sections 29001-29022 inherently and as construed and applied in this case violate due process clauses of the Fourteenth Amendment to the Constitution of the United States; that its construction and application in this case is unconstitutional and in violation of the Fourteenth Amendment to the Constitution of the United States.

The Attorney General caused to be filed in the Superior Court of the State of California a petition to that Court to enforce the subpoena duces tecum to compel the school to produce the data set forth in the subpoena of the Attorney General.

The Superior Court of the State of California, in and for the County of Los Angeles, issued its order to Frank Csaszar and Technical Publications Institute on September 20, 1960 ordering the said Institute to appear on October 13, 1960 at 3:30 p.m. with the docu-

ments and records set forth in the subpoena duces tecum of the Attorney General.

A petition for a Writ of Prohibition was thereafter filed in the District Court of Appeal of the State of California to prohibit and prevent the enforcement of the subpoena duces tecum on the grounds that the statutes, Sections 29001-29020 of the Education Code inherently and as construed and applied violate the First, Fourth, Fifth and Fourteenth Amendments to the Constitution of the United States.

The District Court of Appeal of the State of California thereafter denied, without an opinion, its Writ of Prohibition and Mandate and any other appropriate Writ and a petition was filed from the order of denial to the Supreme Court of the State of California. The Court likewise, on December 7, 1960, denied a hearing from the petition for a Writ of Prohibition and Mandate and any other appropriate Writ, challenging the constitutionality of the Education Code inherently and as construed and applied in this case and the power and authority of the Attorney General of the State of California under the Government Code of the State of California, Sections 11183-11188 inherently and as construed and applied in this case, as being in violation of the First, Fourth, Fifth and Fourteenth Amendments to the Constitution of the United States. Thus the State of California has passed upon the issues involved and upheld the constitutionality thereof, the Honorable B. Rey Schauer, Justice of the Supreme Court of the State of California, voting for a hearing.

On November 18, 1960 the Honorable Ellsworth Meyer, Judge of the Superior Court, found plaintiffs

in contempt of Court and fined Technical Publications Institute and Frank Csaszar \$200 or, as an alternative, 5 days in jail, and stayed the execution of the judgment to November 30 and thereafter, on his own motion, stayed the judgment to and including December 10, 1960. Plaintiffs have therefore submitted their questions of constitutionality of the statutes involved under the state law of the State of California to the highest Court of the state and the challenge as being in violation of the constitution of the United States has been denied and the constitutionality of the California statutes involved has been implicitly upheld as not being in violation of the First and Fourteenth Amendments to the Constitution of the United States.

Plaintiffs claim that:

I

The statutes (Sections 29001-29020, Education Code) under which the investigation and subpoena are attempted to be issued, inherently and as construed and applied in this case, would interfere with private business and property owners' rights and the right of the school to make contracts without interference from the state and without subjecting itself to state inspection and the right to carry on business with freedom from interference and investigation and disclosure of its private student lists, a valuable business asset. The interference, furthermore, is a violation of due process of law and the equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States.

A. The Attorney General has no authority to compel a search or seizure by means of a subpoena duces tecum or to compel persons to furnish evidence which may make them guilty of a crime.

II

The statutes (Sections 29001-29020 of the Education Code) inherently and as construed and applied in this case by the Superior Court, constitute an unlawful invasion of freedom of the press and of publication, in violation of Article I, Section 9 of the Constitution of the State of California and the First and Fourteenth Amendments to the Constitution of the United States. They constitute an attempt to censor education and educational material.

III

Sections 29001 to 29020 of the Education Code, inherently and as construed and applied in this case, are violative of Article I, Sections 1 and 9 of the Constitution of California and of the due process clause of Article I, Section 13 of the Constitution of California and of the due process and equal protections clauses of the Fourteenth Amendment of the Constitution of the United States, and interfere with the private right of contract under the provisions of Article I, Section 10 of the United States Constitution and constitute the taking of private property and interference with private rights in violation of Article I, Section 1 of the Constitution of California, Article I, Section 13 of the Constitution of California and the Fourteenth Amendment to the Constitution of the United States.

IV

Section 29001 of the Education Code, inherently and as construed and applied in this case, is too vague, uncertain and indefinite to constitute a standard, the violation of which can constitute a crime and therefore violates due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States.

V

The attempted securing of a subpoena duces tecum for the purpose of investigating acts which may constitute a crime is in violation of Article I, Sections 13 and 19 of the Constitution of California and the Fourth, Fifth and Fourteenth Amendments to the Constitution of the United States. It is an exploratory search for evidence of a crime and, in effect, compels self-incrimination.

VI

The Statutes, Sections 29001 to 29020, deny the equal protection of law to private schools and the classifications therein contained are unreasonable, arbitrary and capricious and in violation of the equal protection clause and the due process clause of the Fourteenth Amendment to the Constitution of the United States. Also, private schools outside the state are not treated equally.

VII

Sections 29001-29020, inherently and as construed in this case insofar as they would impair the obligation of contract to teach privately and give letters or certificates of completion, violate Article I, Section 10,

United States Constitution in that they impair the obligation of contract.

VIII

Section 29011, Education Code, and Section 11188, Government Code, inherently and as construed in this case, violate Article I, Section 19 and Article I, Section 13 of the Constitution of California and authorize an unreasonable search and seizure in violation of Article I, Section 19, Constitution of California, and the Fourteenth Amendment to the Constitution of the United States.

IX

The affidavit in support of the alleged subpoena duces tecum is on information and belief and fails to set out facts giving any jurisdiction to the Attorney General or his Deputies or to the Superior Court.

X

There was no showing of any affidavit by the Department of Public Education of the State that it has requested the Attorney General to make such an investigation or that there has been any violation of its rules and regulations, or that the Technical Publications Institute comes within the jurisdiction of the said Department of Public Education.

XI

The attempt to control private education by means of controlling a facet of it through a statute regarding diplomas violates the basic concept of American Liberty. It is a matter of historical knowledge that Hit-

ler stated he was able to get control of Germany by getting control of its schools. There is no reasonable relationship between an investigation regarding diplomas as defined in Section 29001 of the Education Code and the purposes of the legislature in preventing the issuance of diplomas in matters relating to the public schools. Section 29001 of the Education Code does not, in any event, encompass schools except those teaching beyond high school level.

XII

The provisions of the Education Code which restrict private education except in institutions having property of a certain value is unconstitutional in that it is arbitrary and capricious and in violation of due process of law, as defined by Article I, Section 13 of the Constitution of California and the Fourteenth Amendment to the Constitution of the United States.

XIII

Sections 29001 to 29020 are violative of Article I, Section 13 of the Constitution of California and the Fourteenth Amendment to the Constitution of the United States inherently and as construed and applied in this case, are unreasonable, arbitrary and capricious and have no reasonable relationship to the objects sought to be obtained. There is no reasonable relationship between the attempt to investigate the list of students and graduates of this private school dealing

in non-public education matters and the objects sought to be obtained by the legislature.

XIV

There is no proper foundation for any production of any books and records since there was no oath or affidavit as required by Article I, Section 19 of the Constitution of California sufficient to lay a foundation for the production of any books and records of a private school teaching private subjects. The subpoena duces tecum therefore was violative of due process of law guaranteed by Article I, Section 1 of the Constitution of California and the Fourteenth Amendment to the Constitution of the United States.

XV

Sections 29001 and 29020 of Sections 11183-11188 of the Government Code inherently, and as construed and applied by this case, violate Article I, Section 19 and Article I, Section 13 of the Constitution of California and the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States.

Plaintiff Frank Csaszar is the manager and operator of Technical Publications Institute.

Plaintiffs herein allege that Sections 29001-29020 of the Education Code inherently and as construed and applied in this case violate the First and Four-

teenth Amendments to the Constitution of the United States.

Technical Publications Institute has suffered great and irreparable harm and damage by reason of the publication of the purported investigation of the Attorney General. The reports thereof have been carried in newspapers and trade publications and have interfered with the credit and other operations of Technical Publications Institute, causing damage to the said Institute in a sum in excess of \$10,000. It also interfered with the handling of the contracts of Technical Publications Institute with its students, some of whom have refused to carry out their contracts because of the reported investigation and thus have required the Institute to file lawsuits and carry on measures to have its contracts observed. It has also caused irreparable damage in the factoring of its contracts, in excess of \$10,000.

Unless the Attorney General and the State of California are restrained from further activity and action in this matter, great and irreparable damage will be done to this educational institution and it may even compel it to go out of business in California.

Its lists of private students and persons who have taken its educational courses and might be qualified for positions in which this institution could furnish the necessary students is a highly valuable asset and is private property and should not be forced to give it up

to the state without compensation on a claimed investigation under a power of subpoena duces tecum. Plaintiffs challenge the constitutionality of each of the sections of the Education Code herein set out which challenges have been presented to the Courts of the State of California and have been passed upon by the Superior, Appellate and Supreme Courts of the State of California.

Wherefore, plaintiffs pray that this Honorable Court issue its temporary and permanent injunctions and issue a temporary stay until a three-judge court can pass upon the constitutionality of the statutes and proceedings in this case inherently and as construed and applied in this case.

/s/ MORRIS LAVINE

Attorney for Plaintiffs

Duly Verified.

[Endorsed]: Filed Dec. 12, 1960.

[Title of District Court and Cause.]

MINUTES OF THE COURT

Date: December 12, 1960. At: Los Angeles,
California.

Present: Hon. Leon R. Yankwich, District Judge.

Proceedings: The request for a temporary restraining order and for the convening of a three-judge statutory court to hear the petition of the Plaintiff for injunction against the Attorney General of California's enforcement of Sections 29001 to 29020 of the Education Code of the State of California and Sections 11183 to 11188 of the Government Code of California is hereby denied.

The Court is of the view that the petition in this case does not show on its face the presence of a substantial federal question required to invoke its jurisdiction either under Sections 2281, 2283 or 2284 of Title 18 of the United States Code or Section 2201 of Title 18.

The statute relating to the power of three-judge statutory courts to stay enforcement by injunctive process of an unconstitutional federal statute require that the complaint state on its face the existence of a substantial federal question. When it does not do so the single judge to whom the petition is addressed may, subject to the right to review, rule upon the matter and decline to grant relief or convene a three-judge court. (Ex parte Poresky, 1933, 290 U. S. 30, 31-32;

Oklahoma Gas Co. v. Packing Co., 1934, 292 U. S. 386, 390-392; Water Service Co. v. Redding, 1938, 304 U. S. 252, 255-256; Eastern States Petroleum Corp. v. Rogers, 1959, 265 F. 2d 593; (per Prettyman, Chief Judge, U. S. App. D. C.) Carrigan v. Sunland-Tujunga Telephone Co. 1959, 263 F. 2d 568, 571-573. And see the writer's opinion in Wylie v. State Board of Equalization, D. C. Cal., 1937, 21 F. Supp. 606.)

The allegations of the complaint do not show the plaintiff to be within the scope of the rulings in *Talley v. California*, 1960, 362 U. S. 60, in which the court invalidated an ordinance of the City of Los Angeles forbidding the circulation of any handbills unless some information as to their origin was printed, or in *N. A. A. C. P. v. Alabama*, 1958, 357 U. S. 449, invalidating a statute of the State of Alabama requiring disclosure of membership of outside organizations, or *Bates v. Little Rock*, 1960, 361 U. S. 310, which invalidates a local ordinance which compelled disclosure of local members of organizations.

The proceedings which it is sought to have us enjoin and declare unconstitutional are proceedings under the provisions quoted in the California codes regulating the conditions for issuing diplomas for the purpose of preventing fraud on the public. The investigation involved before the California courts aim to investigate whether there has been violation of any of these provisions.

Private schools have a right to exist, but the State may regulate them provided the regulations are not unreasonable in preventing a right of a person to be educated privately or the right of a parent to educate his child privately. (Meyer v. Nebraska, 1923, 262 U. S. 390; Pierce v. Society of Sisters, 1925, 268 U. S. 510, 532-525; Farrington v. Tokushige, 1927, 273 U. S. 284, 298, 299) Subject to this limitation the State has a right

“to regulate all schools, to inspect, supervise and examine them, their teachers and pupils; to require that all children of proper age attend some school, that teachers shall be of good moral character and patriotic disposition, that certain studies plainly essential to good citizenship must be taught.” (Pierce v. Society of Sisters, *supra*, p. 534)

The Sections under which the inquiry is being conducted do not go beyond the power so recognized.

While under the view taken the court would be justified in dismissing the petition as was done in the cases cited and sanctioned by the Court of Appeals for the Ninth Circuit, Carrigan v. Sunland-Tujunga Telephone Co., *supra*, we do not take this action so that counsel may be free to serve the complaint and have the issue which the court has raised *sua sponte* determined upon such adversary pleadings as may be filed by the named defendant.

/s/ LEON R. YANKWICH,
U. S. District Judge.

cc: Morris Lavine, Esq.

215 West 7th St.

Los Angeles 14, California

Hon. Stanley Mosk,
Atty. Genl. State of Calif.

Norman L. Epstein, Esq.

Deputy

600 State Bldg.

Los Angeles 12, Calif.

JOHN A CHILDRESS,
Clerk.

By
Deputy Clerk.

[Endorsed]: Filed Dec. 12, 1960. Entered Dec.
15, 1960.

26 *Technical Publications Institute, etc., et al. vs.*

United States District Court
Southern District of California

Office of the Clerk
Room 231, U. S. Post Office & Court House
Los Angeles-12, California.

Morris Lavine, Esq.
215 West Seventh St.
Los Angeles 14, Calif.

RE: Technical Publications Institute et al, vs. Mosk,
etc., et al, No. 1381-60-Y.

You are hereby notified that Order denying request
for temporary restraining order etc. in each of the
above-entitled cases was entered this day Dec. 15, 1960
in the docket.

I hereby certify that this notice was mailed on Dec.
15, 1960.

CLERK, U. S. DISTRICT COURT,
/s/ By C. A. SIMMONS,
Deputy Clerk.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To Stanley Mosk, Attorney General of the State of California and the State of California, Defendants:

Notice is hereby given that Technical Publications Institute and Frank Csaszar appeal herewith from the order and judgment of United States District Court Judge Yankwich denying Technical Publications Institute and Frank Csaszar a temporary injunction and denying the calling of a three-judge court for the purpose of hearing the application for a temporary and permanent injunction on the ground that the statutes involved, and each of them, were and are in violation of the Constitution of the United States.

Dated: January 9, 1961.

/s/ MORRIS LAVINE,
Attorney for Plaintiffs

Affidavit of Service by Mail Attached.

[Endorsed]: Filed Jan. 9, 1961.

[Title of District Court and Cause.]

PRAECIPE

To the Clerk of the United States District Court:

You are requested to prepare forthwith a record on appeal in the foregoing action and to include in the record the Clerk's Transcript, containing the complaint, the order of Judge Yankwich dated December 12, 1960 which is in the minutes of the Court, denying the application for temporary restraining order and for the convening of a three-judge statutory court, the Notice of Entry of the said judgment, the books and records of the Clerk, the Notice of Appeal and this Praecipe.

Dated: January 9, 1961.

/s/ MORRIS LAVINE,
Attorney for Plaintiffs.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed Jan. 9, 1961.

[Title of District Court and Cause.]

ORDER EXTENDING TIME FOR PREPARING
RECORD ON APPEAL FROM THE ORDER
DENYING THE TEMPORARY INJUNC-
TION.

Good cause appearing therefor,

It Is Ordered that the time within which the Clerk
may complete and file and docket the record on appeal
from the Order denying the temporary injunction be,
and it is, extended to the 31st day of March, 1961.

Dated: This 24th day of February, 1961.

/s/ LEON R. YANKWICH,
Judge Presiding.

[Endorsed]: Filed Feb. 24, 1961.

[Title of District Court and Cause.]

CERTIFICATE BY THE CLERK

I, John A. Childress, Clerk of the above-entitled Court, hereby certify that the foregoing documents together with the other items, all of which are listed below, constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit, in the above-entitled case:

Page:

- 1 Names and Addresses of Attorneys
- 2 Petition for Statutory Three-Judge Court, for Injunction against the enforcement of State Statutes of the State of California, etc., filed 12/12/60
- 18 Order of Court denying petition, filed 12/12/60 and entered 12/15/60
- 20 (copy) Clerk's notice of entry of order denying request for temporary restraining order, etc., dated 12/15/60
- 21 Notice of Appeal, filed 1/9/61
- 23 Praecipe, filed 1/9/61
- 25 Order extending time for preparing record on appeal, filed 2/24/61

Dated: March 7, 1961.

[Seal]

JOHN A. CHILDRESS,
Clerk.
/s/ By WM. A. WHITE,
Deputy Clerk.

[Endorsed]: No. 17385. United States Court of Appeals for the Ninth Circuit. Technical Publications Institute, and the owners and operators thereof, and Frank Csaszar, its manager, Appellant vs. Stanley Mosk, Attorney General of the State of California, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed: March 8, 1961.

Docketed: May 25, 1961.

/s/ FRANK H. SCHMID,

Clerk of the United States Court of Appeals for the
Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 17385

TECHNICAL PUBLICATIONS, INC.,

Appellant,

vs.

THE PEOPLE OF THE STATE OF CALIFOR-
NIA AND STANLEY MOSK, ATTORNEY
GENERAL,

Appellee.

STATEMENT OF POINTS UPON WHICH THE
APPELLANT INTENDS TO RELY ON AP-
PEAL

Comes now Technical Publications, Inc. and Frank Csaszar, its manager, and designate the points upon which they intend to rely on appeal:

(1) The Court below erred in declining to call a three-judge court session to determine the constitutionality of the Education Code of the State of California, and particularly the constitutionality of Sections 29001 to 29022, inclusive, of the Education Code of the State of California.

(2) The District Court erred in declining to hear and determine and to call a three-judge court to hear and determine the constitutionality inherently and as construed and applied in this case of Section 11183 of the Government Code of the State of California in relation to and in connection with Sections 29001 to

29022 of the Education Code of the State of California.

(3) Sections 29001 to 29022 of the Education Code of the State of California, inherently and as construed and applied in this case, violate the due process clause of the Fourteenth Amendment to the Constitution of the United States.

(4) The Education Code of the State of California, Sections 29001 to 29022, inherently and as construed and applied in this case, violate the equal protection clause of the Fourteenth Amendment to the Constitution of the United States.

(5) The District Court erred in declining to enjoin the enforcement of Sections 29001 to 29022 of the Education Code of the State of California, as it applies to these appellants on the grounds that these sections violate the Twelfth and Fourteenth Amendments to the Constitution of the United States.

(6) The Sections 29001 to 29022 of the Education Code of the State of California, inherently and as construed and applied in this case, violate the First Amendment to the Constitution of the United States.

Appellant intends to urge that the District Court was duty bound to call a 3-judge court and to enjoin the illegal enforcement of the provisions of the Education Code of the State of California, Sections 29001 to 29022, as above set out.

/s/ MORRIS LAVINE,
Attorney for Appellant.

[Endorsed] : Filed August 9, 1961. Frank H. Schmid,
Clerk.

No. 17,387

IN THE

**United States Court of Appeals
For the Ninth Circuit**

UNITED STATES OF AMERICA,	}
vs.	
CHARLES E. and LOIS ROSEBROOK,	
	<i>Appellant,</i>
	<i>Appellees.</i>

On Appeal from the Judgment of the United States District
Court for the Northern District of California

BRIEF FOR THE APPELLANT AND APPENDICES

LOUIS F. OBERDORFER,
Assistant Attorney General.

LEE A. JACKSON,

ROBERT N. ANDERSON,

HAROLD M. SEIDEL,
Attorneys, Department of Justice,
Washington 25, D. C.

CECIL F. POOLE,
United States Attorney.

RICHARD L. CARICO,
Assistant United States Attorney.

FILED

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No. 17,387

IN THE

**United States Court of Appeals
For the Ninth Circuit**

UNITED STATES OF AMERICA,	}
vs.	
CHARLES E. and LOIS ROSEBROOK,	
	<i>Appellant,</i>
	<i>Appellees.</i>

**On Appeal from the Judgment of the United States District
Court for the Northern District of California**

BRIEF FOR THE APPELLANT AND APPENDICES

OPINION BELOW

The opinion of the District Court (R. 11-18) is reported at 191 F. Supp. 356.

JURISDICTION

This appeal involves federal income taxes. The taxes in dispute were paid on September 28, 1959. (R. 19.) Claim for refund was filed on September 29, 1959, and was rejected December 17, 1959. (R. 5, 7.) Within the time provided in Section 6532 of

the Internal Revenue Code of 1954 and on December 18, 1959, the taxpayers brought an action in the District Court for recovery of the taxes paid. (R. 3-6.) Jurisdiction was conferred on the District Court by 28 U. S. C., Section 1346. The judgment was entered on January 3, 1961. (R. 26-27.) Within sixty days and on March 2, 1961, notice of appeal was filed by the United States. (R. 27.) Jurisdiction is conferred on this Court by 28 U. S. C., Section 1291.

QUESTION PRESENTED

Whether the District Court erred in holding that the taxpayer as a member of a joint venture received capital gain and not ordinary income on the sale of 884 acres of realty by the venture.

STATUTES INVOLVED

The statutes involved are set forth in Appendix A, *infra*.

STATEMENT

The facts as found and stated by the District Court in its opinion (R. 11-14) are as follows:

For some time prior to 1953, George W. Williams, Lois Rosebrook's¹ father, had been attempting to pur-

¹Lois Rosebrook will hereinafter be referred to as the taxpayer since her husband, Charles E. Rosebrook, is a party to this action only because a joint return was filed. (R. 11.)

chase approximately 1,159.6 acres of San Francisco peninsula land owned by the San Bruno Lands, Inc. (R. 11-12.)

He was not able to obtain sufficient financing to make the purchase until 1953 when he interested a group, including himself, Frank Burrows, Andrew Conway, Martin Wunderlich and Thomas Culligan—all of whom were prominent in the real estate subdivision business. (R. 12.)

On April 23, 1953, these parties entered into an agreement (Deft. Ex. A) that they would purchase the stock of San Bruno Lands, Inc., for a total of \$1,150,000, in order to acquire the 1,159.6 acres of land and that after acquisition they would dissolve the corporation and take the land as tenants in common in proportion to their respective contributions.² (R. 12.)

On the same day they entered into another, separate memorandum (Deft. Ex. B, Appendix C, *infra*) to the effect that the respective tenants in common would hold the land for six months in order to realize a capital gain and then sell it to a development corporation to be formed by the parties for the purpose of developing and subdividing the land, the stock in any such corporation to be issued—one third to Williams

²It was agreed that Williams and Burrows should contribute $\frac{1}{3}$, Wunderlich $\frac{1}{2}$, and Conway and Culligan $\frac{1}{6}$ of the purchase price; only 10% of that amount was to be contributed upon execution of the agreement. The agreement provided that their interests in the property were to correspond with the above contributions. (Deft. Ex. A.)

and Burrows, one third to Conway & Culligan and one third to Wunderlich. (Deft. Ex. B; R. 12.)

It was understood, i.e., the memorandum stated, that these respective parties were acting, not only for themselves, but for other interests represented by them. (R. 12.)

Accordingly, on May 7, 1953, the group purchased the capital stock of the San Bruno Lands, Inc. The corporation was immediately liquidated and the land was taken in the name of the group who then quit-claimed it to all contributing interests as tenants in common according to their respective contributions to the purchase price and took back a power of attorney for purposes of management. (R. 12-13.)

Among the contributing interests represented in these transactions by George W. Williams was a certain irrevocable trust which he and his wife had created in 1942 for their daughter, the taxpayer. Her father, George W. Williams, was sole trustee. In 1953 there was cash on hand in the trust in the amount of \$10,000. Williams, acting as trustee, contributed \$7,000 on behalf of the trust as part of the contribution of his group to the acquisition of the San Bruno land. In due course, the trust received a conveyance of a 1% interest therein as tenant in common. (R. 13.)

On October 28, 1953, Williams, Burrows, Conway, Culligan and Wunderlich, and an outside party, organized Consolidated Land Company for the purpose of subdividing and developing the San Bruno land. (R. 13.)

On December 18, 1953, when taxpayer was 28 years of age, the trust was dissolved and all the trust assets, including the 1% interest in the San Bruno land, were transferred by her father, as trustee, into her name. (R. 13.)

On February 10, 1954, the tenants in common of the 1,159.6 acres, sold and conveyed 884.2 acres of the parcel to Consolidated Land Company for a total purchase price of \$1,768,500, payable in \$100,000 cash and an installment note of the corporation for the balance. (R. 13.)

Taxpayer, concurring in the suggestion of her father, conveyed her 1% interest to the corporation and received the sum of \$1,000 in cash and a 1% interest in the installment note for the balance. (R. 13.)

The Commissioner ruled that the gain on this sale was not a capital gain to the taxpayer, but ordinary business income to her. The trial court disagreed and awarded judgment for the taxpayer. (R. 11-18.) In so doing it stated that assuming and finding that George W. Williams, the taxpayer's father, trustee and agent, and others in the joint venture held their interests in the land in question primarily for sale to customers in the ordinary course of their business, it does not necessarily follow that the taxpayer held her 1% interest with the same intent and purpose. (R. 14.)

STATEMENT OF POINTS TO BE URGED

1. The District Court erred in holding that the taxpayer as a member of the joint venture did not hold her interest in the land in question primarily for sale to customers in the ordinary course of a trade or business.

2. The District Court erred in holding that the taxpayer properly reported the gain realized upon the sale of her interest in the 884.2 acres of land as capital gain.

3. The District Court erred in failing to hold that the taxpayer as a member of the joint venture received ordinary income rather than capital gain on the sale of her interest in the 884.2 acres of realty by the venture.

SUMMARY OF ARGUMENT

The District Court found that the taxpayer participated in a joint venture to acquire certain real property, hold it for at least six months, and then sell it to a corporation to be formed by the principal, active, members of the venture to develop, and subdivide the realty. The court also held that in a joint venture, unlike a partnership, each of the participants may hold his interest in the realty for a different purpose. It concluded that the principal members of the venture, who were prominent in the real estate subdivision business, held their interests in the real property primarily for sale to customers in the ordinary course of the business—that the joint venture was merely a step in carrying on the business enterprise—because

they were going to, and did, subdivide the property through the medium of the corporation (Consolidated Lands) which they formed for that purpose. However, because neither the taxpayer nor her predecessor in the joint venture, a trust for her benefit, had any interest in Consolidated, the District Court held that her purpose in holding her interest in the realty was different from that of her fellow venturers and that she was not holding her interest primarily for sale to customers.

In our view, the District Court erred in holding that each member of a joint venture may hold his interest in the realty for a different purpose. Under the Internal Revenue Code, the question of whether a member of a joint venture receives capital gain or ordinary income on a sale of an asset by the venture turns on whether the asset was a capital asset in the hands of the venture, or, whether the venture held the asset primarily for sale to customers in the ordinary course of its business. In a joint venture, there is a community of interest in the enterprise; therefore there must be a common purpose in holding the property. The common purpose of the joint venture at bar was to sell the land for subdivision through the medium of a corporation controlled by the principal venturers, and, looking at the entire transaction as a whole, it is evident that the acquisition and sale of the land by the venture were merely steps in the subdivision of the 884 acres sold to Consolidated.

In a joint venture, all the members have a common purpose, and since the purpose of the principal, active,

and dominant members of the venture was the acquisition of the property as a step in its subdivision, it follows that the represented and inactive members accepted this purpose by participating in the venture. Moreover, since each member of a joint venture is an agent of the others in transacting the venture's business, the active, principal and controlling members, in acquiring the land through the venture as a step in their business enterprise, were acting for and on behalf of the passive and represented members, and determined the venture's purpose for all the members.

The District Court's opinion states that if the participants in the transaction had acted through a "true business partnership" rather than a joint venture, then it would have imputed to the passive and represented members the purpose of the principal, active and controlling members. Since there is little difference between a partnership and a joint venture, and since a joint venture is considered a partnership for tax purposes, the court below erred in applying different standards for these organizations. This conclusion is supported by the fact that the results of the transaction were the same whether the organization was a partnership or a joint venture.

ARGUMENT

THE DISTRICT COURT ERRED IN HOLDING THAT THE TAXPAYER AS A MEMBER OF THE JOINT VENTURE RECEIVED CAPITAL GAIN INCOME ON THE SALE OF THE REAL PROPERTY BY THE VENTURE

A. Introduction

A trust for the benefit of the taxpayer, of which the taxpayer's father and mother were grantors and her father was the trustee, acquired as a member of a joint venture a 1% interest in 1,159.6 acres of land on the San Francisco peninsula near San Bruno, California. The land was acquired pursuant to an agreement between taxpayer's father and others prominent in the real estate business that a corporation owning the land (San Bruno Lands, Inc.) would be acquired and liquidated and that the land would then be held by those participating in the venture as tenants-in-common. A memorandum executed at the same time as the above agreement provided that the land was to be sold more than six months after it was acquired to a corporation organized and owned by the principals involved, i.e., taxpayer's father and the others prominent in the real estate business, for an average price of \$2,000 per acre and that that corporation would subdivide and develop the land by construction of homes and business areas. (R. 12-13.)

The land was acquired by the trust and the other tenants-in-common when San Bruno Lands, Inc., was dissolved on May 7, 1953. On December 18, 1953, the trust for taxpayer's benefit was dissolved, and on February 10, 1954, the taxpayer, who had taken her interest in her own name, and the other tenants-in-

common conveyed their interests in part of the land (884.2 acres) for \$2,000 per acre to a corporation (Consolidated Lands) organized by taxpayer's father and the other principals involved in the venture. On the conveyance, the taxpayer received \$1,000 cash and an installment note for the balance. Neither the taxpayer nor her trust had any interest in Consolidated. (R. 12-13.)

Section 1221 of the Internal Revenue Code of 1954 (Appendix A, *infra*) defines the term "capital asset" to mean property held by a taxpayer but excepts from that term, *inter alia*, property held by a taxpayer primarily for sale to customers in the ordinary course of his trade or business.

The principal issues below, as the District Court's opinion states (R. 14), were whether the taxpayer—held her 1% interest for the same purpose and with the same intent as all others participating in the venture, and, further that even if such was not her intent and purpose, [whether] the intent and purpose of her father, and others in the venture would be imputed to her as a matter of law by reason of her participation in it.

The court found (R. 12) that the principal participants in the acquisition of the San Bruno land (George Williams, the taxpayer's father, Frank Burrows, Andrew Conway, Martin Wunderlich, and Thomas Culligan) were all prominent in the real estate subdivision business, and that they planned to acquire the San Bruno land, hold it for six months in order to realize capital gains, and then sell it to a development cor-

poration to be formed by them for the purpose of subdividing and developing the land.³ The court concluded (R. 14) that George Williams, the taxpayer's "father, trustee and agent, and others in the joint venture held their interests in this land primarily for sale to customers in the ordinary course of their business" because (R. 15) from the start they intended to and did develop and sell the land through and by means of Consolidated Lands, the development corporation which they formed.⁴

Thus, if the taxpayer held her interest with the same intent as the other participants or if their intent is imputed to her by reason of her participation in the venture, then the taxpayer would also be considered as holding her interest primarily for sale to customers. In either of these events, her interest would not be a capital asset under Section 1221 and the income from the sale would not be subject to the

³It should be noted that this finding was made, as the opinion states (R. 12), on the basis of the memorandum executed by these parties on April 23, 1953 (Deft. Ex. B, Appendix C, *infra*), the same day that they agreed in another writing to buy the stock of San Bruno Lands, Inc., in order to obtain the land held by that corporation. In so finding, the court rejected the other interpretations placed on that memorandum by Mr. Williams and Mr. Burrows. (R. 102-107, 125-127.) The rejection of their explanations was wholly within the trial court's discretion, particularly in light of the fact that this litigation may affect their personal tax liabilities with respect to the same transaction and they were accordingly parties in interest. (R. 71-72.)

⁴Even if these principal parties were not otherwise engaged in the real estate subdivision business, the scheme of purchasing 1,159 acres and holding 884 acres for sale to a corporation controlled by them for subdivision and resale (R. 12) is sufficient to constitute a trade or business with respect to the 884 acres. *Burgher v. Campbell*, 244 F. 2d 863 (C.A. 5th); *Pool v. Commissioner*, 251 F. 2d 233, 248 (C.A. 9th); *Rollingwood Corp. v. Commissioner*, 190 F. 2d 263, 266 (C.A. 9th).

special treatment accorded capital gain by Sections 1201 and 1202 of the Code. (Appendix A, *infra*.)

With respect to the first of the principal issues, whether the taxpayer held her 1% interest with the same purpose and with the same intent as all others participating in the venture, the court found (R. 14-15) that she did not because neither she nor her trust had any interest in Consolidated. The court also found that the trust for the benefit of the taxpayer was not engaged in the real estate business nor was the taxpayer herself so engaged. (R. 16.)

The court thus attempted to eliminate on the basis of its findings two possible grounds for holding her interest was not a capital asset: she was not in the real estate business apart from this transaction, and her interest in this transaction, limited to the purchase and the subsequent sale to Consolidated without any interest in Consolidated, did not require that she be considered as holding her interest for sale to customers in the ordinary course of business.

With respect to the other principal issue, whether the intent and purpose of her father and others in the venture would be imputed to her because of her participation in that venture, the court in the following quoted paragraphs of its opinion found that the taxpayer participated in a joint venture in the San Bruno land, but held that the taxpayer's purpose in so participating was different from that of the other members of the venture (R. 14, 17):

Assuming, and finding for the purpose of this case, that George W. Williams, plaintiff's father,

trustee and agent, and others in the joint venture held their interests in this land primarily for sale to customers in the ordinary course of their business, it does not necessarily follow that this plaintiff held her 1% interest with the same intent and purpose.

* * *

The intent and purpose of participants in a joint venture, which contemplated a sale of their respective realty interests to an ultimate purchaser, as in this case the development company, might be quite different one from another. For some it may be just a step in carrying on their business; for others it may be merely a single opportune investment with a view of ultimate profit but unrelated to any business of the participant, as in the case of plaintiff here. In the absence of a true business partnership for the purpose of the transaction, which the Court finds did not exist here, the intent and purposes of the former category are not imputed to the latter category, nor does the situation of the former for tax purposes necessarily determine the situation of the latter.

We accept the finding that there was a joint venture but we respectfully submit that the court erred as to the legal effect of the purposes and objectives of a joint venture on all the venturers.

B. The District Court erred in determining the legal effect of the purposes and objectives of a joint venture on the members of the venture

In the second paragraph quoted above from the opinion below, the District Court held that in the case of a joint venture the intent and purposes of

the principal venturers (for whom the venture is a means for carrying on a business) are not to be imputed to a single venturer (for whom the venture is allegedly an opportune investment unrelated to any business of the venturer). However, the court held that if the enterprise had been conducted through a "true business partnership" it would have imputed the purpose of the principal participants in the transaction to the others involved, such as the taxpayer at bar.

Before discussing what we submit is the court's error in determining the tax consequences to a member of a joint venture of the activity of such venture, it should be noted that the Internal Revenue Code of 1939 and the 1954 Code both provide that the term "partnership" when used therein includes, *inter alia*, a joint venture and that the term "partner" includes a member of a joint venture. See Section 3797(a)(2) of the 1939 Code and Section 7701(a)(2) of the 1954 Code (Appendix A, *infra*). The Code provisions relating to partnerships are thus applicable to joint ventures. *Haley v. Commissioner*, 203 F. 2d 851 (C.A. 5th); *Rupple v. Kuhl*, 177 F. 2d 823 (C.A. 7th); *First Mechanics Bank v. Commissioner*, 91 F. 2d 275 (C.A. 3d).

Sections 181 and 182 of the 1939 Code (Appendix A, *infra*) provide that a partnership is not a taxpayer but is a tax reporting entity and that the partners are required to pay tax on their distributive shares of the partnership's income whether or not received by them. Under 1939 Code Section 183 (Appendix A, *infra*),

the partnership's capital gains and losses are segregated from its ordinary income and thus are characterized in the partnership's hands. The partners report their distributive shares of the partnership's capital gain and of its ordinary income; the characterization of partnership income is thereby retained in the partners' distributive shares. *Neuberger v. Commissioner*, 311 U.S. 83; *Commissioner v. Paley*, 232 F. 2d 915 (C.A. 9th); *Commissioner v. Ammann*, 228 F. 2d 417 (C.A. 5th). Sections 701, 702(a)(1) and (2), (b), (c), and 703(a) of the 1954 Code (Appendix A, *infra*) contain the same provisions. Hence to determine whether a partner's distributive share of partnership income from the sale of an asset is capital gain or ordinary income, it is necessary to determine the nature of that income in the partnership's hands, which in turn depends on whether the property in question was a capital asset in the partnership's hands within the meaning of the statute, or held by it primarily for sale to customers in the ordinary course of its business. Since the term "partnership" by statute includes a joint venture, the same would be true with respect to a joint venture. Thus, in determining the nature of the land in the venture's hands here in question, it is immaterial that title was held in the members' names as tenants-in-common and not by the joint venture since the members were holding title on behalf of and in the course of the joint enterprise.

Turning to the question of whether the 884 acres were a capital asset under Section 1221 in the joint

venture's hands or whether the land was held by it primarily for sale to customers in the ordinary course of its business, let us briefly examine the nature of a joint venture. A joint venture is an undertaking by two or more persons jointly to carry out a single business enterprise for profit, and involves a community of interest in the enterprise and a sharing of profits and losses. It is akin to or has the earmarks of a limited partnership. *Engineering Serv. Corp. v. Longridge Inv. Co.*, 153 C. A. 2d 404, 410-415, 314 P. 2d 563, 566-570; *Bariffi v. Longridge Dev. Co.*, 156 C. A. 2d 538, 320 P. 2d 192. Accordingly, there must be a common purpose in holding the property. The joint nature or purpose of the undertaking under consideration is shown by the April 23rd memorandum which stated that after the San Bruno tract was acquired it was to be held for at least six months and that it was then to be sold to a corporation formed by the principal parties in the venture and that corporation was to develop and subdivide the property.

In considering this purpose, the Supreme Court's holding in *Commissioner v. Court Holding Co.*, 324 U. S. 331, 334, is particularly appropriate here:

The incidence of taxation depends upon the substance of a transaction. The tax consequences which arise from gains from a sale of property are not finally to be determined solely by the means employed to transfer legal title. Rather, the transaction must be viewed as a whole, and each step, from the commencement of negotiations to the consummation of the sale, is relevant. A sale by one person cannot be transformed for tax

purposes into a sale by another by using the latter as a conduit through which to pass title. To permit the true nature of a transaction to be disguised by mere formalisms, which exist solely to alter tax liabilities, would seriously impair the effective administration of tax policies of Congress.

The venture here acquired the property for sale to Consolidated and that objective was carried out. Thus, viewing the entire transaction as a whole, we submit that it cannot be gainsaid that the acquisition of the property by the venture was for the purpose of selling it to Consolidated for subdivision and resale and it was held for more than ten months with that objective in mind. The venture's acquisition and sale were integral steps in the transaction commencing with the acquisition of the land and terminating with its resale by Consolidated. Hence the venture, by its participation in the transaction, was indirectly engaging in the business of selling the property through Consolidated, and it must therefore be considered as holding the property for that purpose; it hardly can be considered as an independent venture acquiring the property solely for investment purposes through an appreciation in its value. (The property was not productive of sufficient income to cover the taxes and other expenses incident to its up-keep and maintenance.)

The above view is supported by the fact that in the common enterprise which is the subject of the joint venture there must be a controlling purpose. Since

the District Court found that the dominant and active members who were interested in Consolidated and who were prominent in the real estate subdivision business had the purpose in acquiring the property of reselling it to Consolidated as part of a single business enterprise, it therefore follows that the represented and inactive venturers, by participating in the venture, accepted this purpose and engaged in the business also. In other words the purpose of the principal or controlling members must certainly be imputed to the represented members. The District Court, however, held that the purpose of the principal members in a joint venture is not to be imputed to the represented members although it would have done so had there been a formal partnership here. We submit that the court erred in drawing this distinction between a joint venture and what it called a "true business partnership", for, as we have indicated, a venture is like a partnership in that both involve a common undertaking and a mutuality of interest in the joint enterprise. Indeed the resemblance between a joint venture and a partnership is so close that the rights and liabilities of joint venturers, as between themselves, are governed by the same principles which apply to a partnership. *Brooks v. Muth*, 144 C. A. 2d 560, 301 P. 2d 404. And since each member of a joint venture is an agent of the others in the transaction of the venture's business and the relationship of the members is that of mutual agency (*Engineering Serv. Corp. v. Longridge Inv. Co.*, *supra*), the purpose of the principal and controlling members must also be that of the

members whom they represented in the venture's affairs (*Foote v. Posey*, 164 C. A. 2d 210, 330 P. 2d 651).

As we have noted the opinion below states that if there had been a "true business partnership" the court would have imputed to the passive, represented participants in the enterprise the purpose of the principals involved, and it found that that purpose was to use the venture as a step in the business of acquiring and subdividing the property through the medium of Consolidated. The court thus implicitly considered the venture's holding the land for more than six months prior to the conveyance to Consolidated as merely a step in the business of subdividing the land in which the represented and passive participants joined the principal participants. We wholly agree with the court's view that, by aging title to the property in an entity not directly involved in subdividing, the principals have not taken the property out of the business but that the represented parties have joined them in a phase or step of the business. However, we submit that in holding that this view of the transaction is applicable only in the case of a partnership and not in the case of joint venture the court erred for, as we have pointed out above, there is no basis for drawing such a distinction particularly in view of the fact that a joint venture is considered to be a partnership for tax purposes; and in point of fact the opinion below cites no authority for doing so.

Not only are the same rules applicable to both a joint venture and a partnership but the consequences of effecting the subdivision in steps by use of an in-

intermediate entity which held title until the six-month's capital gains period had elapsed are the same regardless of whether the entity is a partnership or a joint venture. In either case the entity, controlled and dominated by the principals involved in the transaction, was employed, we submit, in an effort to siphon off at capital gains rates some of the profits to be realized by Consolidated on the subdivision for the benefit of these principals, their children, trusts for their children, and for their wholly-owned corporations. Because of the limited time which it was agreed that the joint venture, or for all practical purposes, the limited partnership would hold (and actually did hold) the property, and because of the fact that it was agreed that the property, after it had been held for that short time, would be conveyed to Consolidated for subdivision, at an agreed average price of \$2,000 per acre, we believe that the joint venture or limited partnership held the property for sale to customers.

The Supreme Court said in *Corn Products Co. v. Commissioner*, 350 U.S. 46, 52—

Congress intended that profits and losses arising from the everyday operation of a business be considered as ordinary income or loss rather than capital gain or loss. The preferential treatment provided by * * * [the capital asset provision] applies to transactions in property which are not the normal source of business income. It was intended "to relieve the taxpayer from . . . excessive tax burdens on gains resulting from a conversion of capital investments, and to remove the deterrent effect of those burdens on such conver-

sions.” *Burnet v. Harmel*, 287 U.S., at 106. Since this section is an exception from the normal tax requirements of the Internal Revenue Code, the definition of a capital asset must be narrowly applied and its exclusions interpreted broadly. This is necessary to effectuate the basic congressional purpose. This Court has always construed narrowly the term “capital assets” * * *.

The joint venture and the taxpayer at bar can hardly be said to be subject to excessive tax burdens on a pre-arranged sale to a related corporation at a fixed price and after a short, fixed holding period. In *Pool v. Commissioner*, 251 F. 2d 233, which also involved the question of whether land was held for sale to customers in the ordinary course of business, this Court applied those provisions narrowly, and stated (p. 249):

The Supreme Court [in *Corn Products*] has warned us that the capital asset provision of our taxing statutes

“must not be so broadly applied as to defeat rather than further the purpose of Congress.”

We urge that the facts in the case at bar also warrant a narrow interpretation of the capital gains provisions.

In summary, the court below correctly viewed the substance of the entire transaction in determining what its tax incidence would have been had there been a partnership involved rather than a joint venture. However, the court erred in not considering a joint venture a partnership for tax purposes, and in not

recognizing that in a joint venture, as in a partnership, the members have a common purpose, and a mutuality of interest in the joint enterprise and that the same rules are applicable to both.

Since the court below erred with respect to a matter of law, we respectfully suggest that its judgment should be vacated and reversed.

CONCLUSION

For the reasons stated above, the judgment of the District Court is erroneous, should be reversed, and judgment should be entered for the United States.

Respectfully submitted,

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September, 1961.

(Appendices A, B and C Follow)

Appendices.

Appendix A

Internal Revenue Code of 1939:

SEC. 181. PARTNERSHIP NOT TAXABLE.

Individuals carrying on business in partnership shall be liable for income tax only in their individual capacity.

(26 U.S.C. 1952 ed., Sec. 181.)

SEC. 182 [as amended by Sec. 150(g), Revenue Act of 1942, c. 619, 56 Stat. 798]. TAX OF PARTNERS.

In computing the net income of each partner, he shall include, whether or not distribution is made to him—

(a) As part of his gains and losses from sales or exchanges of capital assets held for not more than 6 months, his distributive share of the gains and losses of the partnership from sales or exchanges of capital assets held for not more than 6 months.

(b) As part of his gains and losses from sales or exchanges of capital assets held for more than 6 months, his distributive share of the gains and losses of the partnership from sales or exchanges of capital assets held for more than 6 months.

(c) His distributive share of the ordinary net income or the ordinary net loss of the partnership, computed as provided in section 183(b).

(26 U.S.C. 1952 ed., Sec. 182.)

SEC. 183 [as amended by Sec. 150(g), Revenue Act of 1942, *supra*; and Sec. 9(c), Individual Income Tax Act of 1944, c. 210, 58 Stat. 231]. COMPUTATION OF PARTNERSHIP INCOME.

(a) *General Rule.*—The net income of the partnership shall be computed in the same manner and on the same basis as in the case of an individual, except as provided in subsections (b), (c), and (d).

(b) *Segregation of Items.*—

(1) *Capital gains and losses.*—There shall be segregated the gains and losses from sales or exchanges of capital assets.

(2) *Ordinary net income or loss.*—After excluding all items of gain and loss from sales or exchanges of capital assets, there shall be computed—

(A) An ordinary net income which shall consist of the excess of the gross income over the deductions; or

(B) An ordinary net loss which shall consist of the excess of the deductions over the gross income.

* * * *

(26 U.S.C. 1952 ed., Sec. 183.)

SEC. 3797. DEFINITIONS.

(a) When used in this title, where not otherwise distinctly expressed or manifestly incompatible with the intent thereof—

* * * *

(2) [as amended by Sec. 340(a), Revenue Act of 1951, c. 521, 65 Stat. 452] *Partnership and Partner*.—The term “partnership” includes a syndicate, group, pool, joint venture, or other unincorporated organization, or venture is carried on, and which is not, within the meaning of this title, a trust or estate or a corporation; and the term “partner” includes a member in such a syndicate, group, pool, joint venture, or organization. A person shall be recognized as a partner for income tax purposes if he owns a capital interest in a partnership in which capital is a material income-producing factor, whether or not such interest was derived by purchase or gift from any other person.

* * * *

(26 U.S.C. 1952 ed., Sec. 3797.)

Internal Revenue Code of 1954:

SEC. 701. PARTNERS, NOT PARTNERSHIP, SUBJECT TO TAX.

A partnership as such shall not be subject to the income tax imposed by this chapter. Persons carrying on business as partners shall be liable for income tax only in their separate or individual capacities.

(26 U.S.C. 1958 ed., Sec. 701.)

SEC. 702. INCOME AND CREDITS OF PARTNER.

(a) *General Rule*.—In determining his income tax, each partner shall take into account separately his distributive share of the partnership's—

(1) gains and losses from sales or exchanges of capital assets held for not more than 6 months,

(2) gains and losses from sales or exchanges of capital assets held for more than 6 months,

* * * *

(b) *Character of Items Constituting Distributive Share.*—The character of any item of income, gain, loss, deduction, or credit included in a partner's distributive share under paragraphs (1) through (8) of subsection (a) shall be determined as if such item were realized directly from the source from which realized by the partnership, or incurred in the same manner as incurred by the partnership.

(c) *Gross Income of a Partner.*—In any case where it is necessary to determine the gross income of a partner for purposes of this title, such amount shall include his distributive share of the gross income of the partnership.

(26 U.S.C. 1958 ed., Sec. 702.)

SEC. 703. PARTNERSHIP COMPUTATIONS.

(a) *Income and Deductions.*—The taxable income of a partnership shall be computed in the same manner as in the case of an individual except that—

(1) The items described in section 702(a) shall be separately stated, and

(2) The following deductions shall not be allowed to the partnership:

* * * *

(26 U. S. C. 1958 ed., Sec. 703.)

SEC. 1201. ALTERNATIVE TAX.

* * * *

(b) *Other Taxpayers*.—If for any taxable year the net long-term capital gain of any taxpayer (other than a corporation) exceeds the net short-term capital loss, then, in lieu of the tax imposed by sections 1 and 511, there is hereby imposed a tax (if such tax is less than the tax imposed by such sections) which shall consist of the sum of—

(1) A partial tax computed on the taxable income reduced by an amount equal to 50 percent of such excess, at the rate and in the manner as if this subsection had not been enacted, and

(2) an amount equal to 25 percent of the excess of the net long-term capital gain over the net short-term capital loss.

(26 U.S.C. 1958 ed., Sec. 1201.)

SEC. 1202. DEDUCTION FOR CAPITAL GAINS.

In the case of a taxpayer other than a corporation, if for any taxable year the net long-term capital gain exceeds the net short-term capital loss, 50 per cent of the amount of such excess shall be a deduction from gross income. In the case of an estate or trust, the deduction shall be computed by excluding the portion (if any), of the gains for the taxable year from sales or exchanges of capital assets, which, under sections 652 and 662 (relating to inclusions of amounts in gross income of beneficiaries of trusts), is includible by the income beneficiaries as gain derived from the sale or exchange of capital assets.

(26 U.S.C. 1958 ed., Sec. 1202.)

SEC. 1221. CAPITAL ASSET DEFINED.

For purposes of this subtitle, the term "capital asset" means property held by the taxpayer (whether or not connected with his trade or business), but does not include—

(1) stock in trade of the taxpayer or other property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year, or property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business;

(2) property, used in his trade or business, of a character which is subject to the allowance for depreciation provided in section 167, or real property used in his trade or business;

* * * *

(26 U.S.C. 1958 ed., Sec. 1221.)

SEC. 7701. DEFINITIONS.

(a) When used in this title, where not otherwise distinctly expressed or manifestly incompatible with the intent thereof—

* * * *

(2) *Partnership and partner.*—The term "partnership" includes a syndicate, group, pool, joint venture, or other unincorporated organization, through or by means of which any business, financial operation, or venture is carried on, and which is not, within the meaning of this title, a

trust or estate or a corporation; and the term “partner” includes a member of such a syndicate-group, pool, joint venture, or organization.

* * * *

(26 U.S.C. 1958 ed., Sec. 7701.)

Appendix B

Table of Exhibits Pursuant to Rule 18(2)(f) as Amended:

<u>Exhibit</u>	<u>Identified</u>	<u>Offered</u>	<u>Received</u>
Pltf. Ex. 2	R. 37	R. 38	R. 38
Deft. Ex. A	R. 79	R. 80	R. 80
Deft. Ex. B	R. 81	R. 82	R. 83, 120
Deft. Ex. C	R. 84	R. 85	R. 85
Deft. Ex. D	R. 85	R. 85	R. 85
Deft. Ex. E		R. 86	R. 86
Deft. Ex. F		R. 91	R. 91
Deft. Ex. G	R. 101	R. 101	Rejected: R. 102 Admitted: For limited purpose, R. 116 Conditionally: R. 135-136

In the course of opposing counsel's opening statement to the court below, which is not included in the printed record, a Partial Stipulation of Facts and attached Exhibits were offered and admitted into evidence as Plaintiff's Exhibit 1. (Tr. 3.) The Exhibits are identified in the Partial Stipulation (R. 8-10) and are numbered as follows: Ex. 1-A, 2-B, 3-C, 4-D, 5-E, 6-F, 7-G, 8-H, 9-I.

Appendix C

DEFT. EXHIBIT B MEMORANDUM

April 23, 1953

South San Francisco

Re: San Bruno Lands Incorporated

Today at a meeting of George Williams, Martin Wunderlich, Andrew Conway and Thomas Culligan, with Robert Crane also present, the parties discussed the purchase of San Bruno Lands Incorporated, a California Corporation and determined that they would make the purchase if the sale could be consummated with the present stockholders, and that the following plan would be carried out.

It is understood that the individuals present were representing various other interests, such as controlled corporations, trusts for their children, and etc., but that the only parties with whom each would have to deal would be George Williams, Frank Burrows, Andrew Conway, Thomas Culligan and Martin Wunderlich. That these individuals controlled the interests which they represented and were in a position to make all necessary decisions for these interests.

An agreement is to be prepared for the purchase of the stock, with Conway and Culligan contributing \$116,666.00, Williams and Burrows \$233,333.00 and Wunderlich contributing \$350,000.00. The balance of the purchase shall be obtained by a loan of approximately \$750,000.00 from the American Trust Com-

pany, with \$250,000.00 being paid off upon the liquidation of San Bruno Lands and \$500,000.00 by a loan in that amount from the San Francisco Bank secured by a Deed of Trust on all the property. The property shall be owned by the parties hereto as tenants-in-common with the interests of each in proportion to contribution. Mr. Gasser, the representative of the present stockholders of San Bruno Lands, shall be contacted immediately and an attempt made to work out the terms of purchase of all of the stock of that Company. Negotiations will attempt to have present condemnation proceedings, 15 acres for school and 40 or 50 acres for the Wherry Housing Act, consummated before title to the stock is transferred. If this cannot be done, the Corporation will be liquidated immediately on purchase of all the stock and the Wherry Housing Act condemnation stalled for six months. The parties are all flexible and will go along with whichever or whatever arrangement seems the most desirable or which can be worked out.

After the San Bruno Lands Company is liquidated, whether this be immediately upon acquisition or after a six months' holding period, with this question to be determined upon further consideration, parties shall for [sic] a development corporation with the stock holdings in that development corporation as follows:

Williams and Burrows	$\frac{1}{3}$ interest
Conway and Culligan	$\frac{1}{3}$ interest
Wunderlich	$\frac{1}{3}$ interest

This corporation will be so organized that it will be in a position to buy the real property from the indi-

vidual owners and allow the individual owners to take a capital gain. The development corporation, or a series of development corporations organized on the same basis, will purchase, either in one piece or in several parcels over a period of time, all of the real property which was formerly owned by San Bruno Lands Incorporated except the approximate 142 acres, commonly known as the "Navy Piece". The development corporation will pay for said land an average of \$2000.00 per acre, which sum may vary with the individual parcels but which shall meet that average by the time all the property has been purchased. The Navy Parcel will be held by the individuals or their interests in the same proportion as their original contribution. The parties have all agreed that the above transactions be carried out in a manner which is most advantageous tax-wise.

The parties intend that the development company or companies will develop the real property by the construction of homes and the development of business areas. However, the parties further anticipate certain acreage will be sold to outside parties as soon as the capital gain can be realized so that the original loan to the San Francisco Bank can be retired as quickly as possible.

[N.B. The original of the above document consisted of two pages both of which carried initials of the parties thereto. See R. 82, 123.]

No. 17,387

IN THE

**United States Court of Appeals
For the Ninth Circuit**

UNITED STATES OF AMERICA,	}
vs.	
CHARLES E. and LOIS W. ROSEBROOK,	
	<i>Appellant,</i>
	<i>Appellees.</i>

On Appeal from the Judgment of the United States District
Court for the Northern District of California

BRIEF FOR APPELLEES

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FILED

JUL 1 1933

FRANK H. GILBERT, CLERK

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No. 17,387

IN THE

**United States Court of Appeals
For the Ninth Circuit**

UNITED STATES OF AMERICA,	}
vs.	
CHARLES E. and LOIS W. ROSEBROOK,	
	<i>Appellant,</i>
	<i>Appellees.</i>

**On Appeal from the Judgment of the United States District
Court for the Northern District of California**

BRIEF FOR APPELLEES

I. OPINION BELOW

The District Court for the Northern District of California on October 19, 1960, entered a "Memorandum and Opinion" (R. 11-18) reported at 191 F. Supp. 356 (1960) in favor of Plaintiffs-Appellees. It entered its Findings of Fact and Conclusions of Law and Judgment (R. 19-27) on January 3, 1961.

II. JURISDICTION

This appeal involves United States income taxes for the calendar year 1955. The Commissioner of Internal Revenue assessed a deficiency of \$303.72 taxes plus \$59.37 interest against Appellees, which was paid on September 28, 1959. A claim for refund thereof was filed on September 29, 1959, and was denied by certified mail on December 17, 1959. On December 18, 1959, taxpayers brought an action in Federal District Court for refund of the amount paid. Jurisdiction was conferred on the District Court by 28 U.S.C. 1346(a) (1). Judgment was entered for Plaintiffs (Appellees) on January 3, 1961. On March 2, 1961, Notice of Appeal was filed by the United States of America. Jurisdiction is conferred on this Court by 28 U.S.C. 1291.

III. QUESTIONS PRESENTED

Does the evidence sustain the District Court's Findings and Conclusions that Appellee, Lois W. Rosebrook, sold an interest in property which was a capital asset in her hands within the meaning of §1221 of the Internal Revenue Code of 1954, and that the said interest in property sold by Appellee was not held by her primarily for sale to customers in the ordinary course of a trade or business.

IV. STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved are set forth in the Appendix, *infra*.

V. STATEMENT OF FACTS

Appellee, Lois W. Rosebrook,¹ was married to Appellee, Charles W. Rosebrook, on February 12, 1955. Said parties filed a joint income tax return for the year 1955 with the District Director of Internal Revenue in San Francisco. (R. 8.)

Appellee was graduated from Stanford University in 1946, with a B.A. degree, majoring in English. From 1946 to 1953, she was a housewife, sometimes working as a medical receptionist. From 1953 to 1955 she worked for an auto rental firm, a rug cleaning firm, and briefly, for her father as a secretary. Since February 12, 1955, she has been a housewife and has not been otherwise employed. (R. 16-20.)

Appellee has never held a real estate broker's or salesman's license and has no pattern or background of real estate activity. (R. 16.) She has never entered into any written or oral partnership agreement or signed a partnership tax return in connection with a real estate venture and has no background or pattern of activity in the real estate business. (R. 20, 32-35.)

In 1942, when Appellee was a minor, her parents, George W. and Hortense Williams, created an irrevocable trust for her benefit. Said trust acquired various assets, including an undivided interest as tenant in common in 1159.6 acres of land in San Bruno, Cali-

¹The interest in land, sale of which is the subject of this suit, was separate property of Lois W. Rosebrook. Charles E. Rosebrook is a party only by reason of having filed a joint return with Lois W. Rosebrook. Hereinafter, the term "Appellee" refers to Lois W. Rosebrook only.

fornia, in May of 1953. (R. 9.) George W. Williams was sole trustee of said trust. (R. 20.)

Sometime prior to 1953, George W. Williams had acquired an option on and was attempting to purchase the aforementioned acreage of land but was not able to obtain sufficient financing. (R. 21.) He therefore interested a group including himself, Frank Burrows, Andrew Conway, Thomas Culligan, and Martin Wunderlich in joining with him in the purchase. It was understood that the above parties were acting not only for themselves but for other interests to be represented by them. (R. 12, 21.)

On April 23, 1953, the above parties entered into an agreement whereby they would purchase the stock of San Bruno Lands, Incorporated, for a total of \$1,150,000 for the purpose of acquiring the land owned by said corporation. (R. 12, 21.)

On April 23, 1953, a writing entitled "Memorandum" was initialed by the above parties. (R. 12, 81-82.) The purpose of this Memorandum was to record the intention of the parties that Conway and Culligan would be entitled to an increased participation from 1/6 (their interest in the land) to 1/3 if the parties formed a corporation or corporations to participate in ultimate development in the land. (R. 96, 104-106, 107, 108, 126-127.) This course of action outlined by the Memorandum was only one of many alternatives considered. (R. 102-107, 125-127.) The course of action outlined by the Memorandum was not carried out according to its terms, in that an outside interest, i.e., Boetcher & Co., became an incorporator

and substantial shareholder of Consolidated Lands, Inc. (R. 13, 22, 107.) It was not intended to be a contract; written contracts were always signed by the parties (R. 103-104, 126); but merely a memorandum recording a contingent future intention which did not affect most of the parties. (R. 106 and 127.) Said Memorandum was not signed or initialed by Appellee and does not mention her or affect the quantum of her interest in any way. (R. 104.) She was traveling abroad at the time it was written. (R. 135.)

On May 7, 1953, a number of people, including George W. Williams as trustee of a trust for the benefit of Appellee, entered into an agreement with Williams, Conway and Wunderlich whereby said three men would acquire the subject property and immediately convey it to them in stated percentages, the interest of the aforementioned trust to be one per cent. (R. 12-13, R. 21.) This procedure was followed because the sellers refused to deal with more than three people. (R. 63.)

Thereupon, said three individuals purchased the stock of San Bruno Lands, dissolved the corporation, took title to the land in their own names, and on June 8, 1953, conveyed it to all of the tenants in common, according to their respective contributions. (R. 12-13, R. 21-22.)

Among the contributors was the trust for the benefit of Appellee, which contributed \$7,000 cash toward the purchase price of the land and received a one per cent undivided interest. (R. 22.) The trust and the other parties held their interests as tenants in

common, each individual tenant paying his share of taxes and interest. (R. 23.)

Appellee's father did not commit the trust of Appellee to a business purpose in holding the land. (R. 17, 22.) Appellee had no knowledge of the existence of the Memorandum of April 23, 1953, and "knew nothing about it"; (i.e., Consolidated Lands, Inc., or any plan for ultimate development of the land). (R. 15, 24, 45.)

The trust for the benefit of Appellee was terminated on December 18, 1953, when Appellee was 28 years old, and the property, including the undivided interest in 1159.6 acres, was unconditionally distributed to her. (R. 40.) No power of attorney relating to the property was granted by Appellee. (R. 23.) The trust from which Appellee acquired her interest never sold an interest in land. (R. 16, 23.)

On February 10, 1954, the tenants in common of the 1159.6 acres, by installment sale, sold and conveyed 884.2 acres of the parcel of land to Consolidated Lands, Inc., a corporation which had been formed in October, 1953, by some of the principals plus a substantial interest in an outside party. (R. 22-23, 90, 107.) They received cash plus an interest in a note. Appellee was not an officer, director or shareholder in Consolidated Lands, Inc. (R. 24, 45.) Appellee had no further interest in the property after it was sold. (R. 13-15, 16.) The sale in question was Appellee's first sale of a parcel or interest in land (R. 16), and she has made only one subsequent sale

(R. 16), and she has no pattern of real estate activity or employment. (R. 16, 20.)

Appellee reported her share of the profit for the year of 1954 and subsequent years as long-term capital gain. For the year 1955 the Commissioner of Internal Revenue determined that installment receipts were taxable as ordinary income and assessed a deficiency against Appellee, after payment of which Appellee filed a claim for refund. Said claim was denied, and this suit was brought to recover said tax. (R. 25.)

VI. SUMMARY OF ARGUMENT

A. The question of whether a taxpayer holds property for sale to customers in the ordinary course of a trade or business within the meaning of 26 U.S.C. §1221 is a question of fact. There is ample evidence in the record to support the trial Court's finding of fact that Appellee's interest was a capital asset. "The evidence negatives any (other) inference." (R. 18.)

B. Appellee was not a member of a partnership or joint venture. The evidence amply supports specific findings which preclude her membership in a true joint venture or partnership.

C. Even if Appellee were held to be a member of a joint venture, the (assumed) intention or purpose of others to hold the property for sale to customers in the ordinary course of a trade or business would not be imputed to her. The intention or purpose of the individual partner is controlling of the tax effects

under IRC §702(b), not the (supposed) intention of the entity.

D. If it is decided that the trial Court held Appellee to be a member of the joint venture and the intent of others is thereby imputed to her, the case must be remanded for retrial because the only evidence supporting this conclusion was improperly admitted into evidence without foundation and over objection of Appellee's counsel.

VII. ARGUMENT

A. THE QUESTION OF WHETHER A TAXPAYER HOLDS PROPERTY FOR SALE TO CUSTOMERS IN THE ORDINARY COURSE OF A TRADE OR BUSINESS WITHIN THE MEANING OF 26 U.S.C. §1221 IS A QUESTION OF FACT. THERE IS AMPLE EVIDENCE IN THE RECORD TO SUPPORT THE TRIAL COURT'S FINDING OF FACT THAT APPELLEE'S INTEREST WAS A CAPITAL ASSET. "THE EVIDENCE NEGATIVES ANY (OTHER) INFERENCE." (R. 18.)

The question of whether one holds property for sale to customers in the ordinary course of a trade or business is a question of fact, and the Court has never substituted legal tests for a determination of this basic question of fact. *Stockton Harbor Industrial Co. v. Commissioner*, 216 F.2d 638 (C.A. 9, 1954); also see *Austin v. Commissioner*, 263 F.2d 460 (C.A. 9, 1959), where the cases to support this point of law are gathered. The record is replete with evidence that Appellee did not have such intention or purpose, and the trial Court so found as a fact. The District Court stated that the record specifically *negatives* such in-

tention. (R. 18.) After listing the District Court's finding as to Appellee's intent as one of the points to be urged on appeal (Appellant's Brief, page 6, Statement No. 2), Appellant does not again seriously urge that Appellee personally had the intention or purpose to hold her interest for sale to customers in the ordinary course of a trade or business.

A capital asset is defined in §1221 of the Internal Revenue Code as including all property except certain types of property specifically excepted therefrom. The exception which Appellant seeks to bring this case under is "property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business." The law is clear that these words must be used in their ordinary and usual sense. This Court said in *Austin v. Commissioner*, 263 F.2d 460 (C.A. 9, 1959):

"The words and phrases 'trade or business', 'ordinary' and 'customers' are to be construed in their ordinary meanings. 'To be engaged in the real estate business means to be engaged in that business in the sense that the term usually implies.' *Yunker v. Commissioner of Internal Revenue*, 256 F.2d 130. The word 'business' '. . . implies that one is kept more or less busy, that the activity is an occupation. . . . It ordinarily is implied that one's own attention and efforts are involved . . .' *Snell v. Commissioner of Internal Revenue*, 97 F.2d 891. As stated in *Fahs v. Crawford*, 161 F.2d 315, at page 317 . . . 'Carrying on a business, however, implies an occupational undertaking to which one habitually devotes time, attention, or effort with substan-

tial regularity. Merely disposing of investment assets at intermittent intervals, without more, is not engaging in business, even though some preliminary effort is necessary to render the asset saleable.' "

In the present case the evidence shows beyond doubt that Appellee had no customers or trade or business of selling real estate, and her only purpose in holding the property which she received by gift was to make this, her first sale, at a gain. (R. 43, 44.) We submit that there is not one scintilla of evidence showing any other purpose. Although frequency of transactions is only one of the tests of whether one is a dealer in real property, in no cases that we have found has a taxpayer been held to be a dealer on her first sale. This result would be particularly shocking if, as here, there is no subsequent pattern of real estate activity, and taxpayer by education, background and station in life is not associated with the business of selling real estate.

The Tax Court, in a case involving a sister of Appellee in a situation arising from the same facts from which the present case arose, held that the sister did not have the intention to hold property for sale to customers in the ordinary course of a trade or business.² It would be anomalous indeed for Appellee to have, as a matter of fact, a different intention than her sister.

²*Katherine Anne Berryman v. Commissioner*, 37 T.C. No. 6 (1961).

The basic question being one of fact, if there is adequate evidence in the record upon which the judgment of the District Court can be affirmed, it must be affirmed; and on this point we submit it would be difficult to conjure up a stronger case for affirmance. Erroneous assumptions in the Memorandum Opinion (if there be such) are not grounds for reversal where the basic question is one of fact and the evidence supports the District Court's findings. It is not necessary for this Court to go beyond this point to affirm the District Court.

B. APPELLEE WAS NOT A MEMBER OF A PARTNERSHIP OR JOINT VENTURE. THE EVIDENCE AMPLY SUPPORTS SPECIFIC FINDINGS WHICH PRECLUDE HER MEMBERSHIP IN A TRUE JOINT VENTURE OR PARTNERSHIP.

We submit that this case involves a simple question of fact in which the District Court's decision is adequately supported by the record, and that the argument above is dispositive of the matter. However, since the Appellant goes at length into a number of matters (which we submit are irrelevant), we are constrained to point out certain basic errors in the inference which Appellant draws from the Memorandum Opinion of the trial Court.

The District Court said that if this were "a true business partnership" it would hold that Appellee realized ordinary income by virtue of being in the real estate business. Appellant builds a complex structure on the simple remark taken out of context from

the Memorandum Opinion. It is elementary hornbook law that the basic difference between a partnership and a joint venture (for substantive law rather than tax law purposes) is that a partnership is a form chosen for continuity of an enterprise which, over a period of time, maintains a continuing business, as contrasted with the joint venture, which is a form chosen when several people come together to carry out a "one shot" project. Clearly, if taxpayer were one of a group of people engaged in a continuous course of conduct of buying and selling real estate, taxpayer would not be entitled to capital gains treatment with respect to the fruits of the continuous conduct. This, we submit, is what the District Court was saying, and no more.

We do not think the Court was using the term "joint venture" in the restrictive sense used by IRC §761(a), nor do we read the Memorandum Opinion as finding that Appellee was a member of a joint venture as that term is known in tax law and then holding that such entity was, nevertheless, to be treated differently than a partnership for tax purposes. The evidence amply supports the findings which preclude her membership in a true joint venture or partnership.

It is interesting to note that in the statement of Appellant's case only the Memorandum Opinion is used as a basis for the statement of facts. (See Appellant's Brief, page 2.) The term "joint venture" can be used to mean a business partnership for one undertaking. On the other hand, it can loosely mean joint ownership or joint investment—a joint endeavor where no

business is carried on, or even an undertaking of a social or non-profit nature by more than one person.³ It is clear that the trial Court, in the Memorandum Opinion, used the term "joint venture" as joint ownership or joint investment and did not use it synonymously with a partnership for a single undertaking. Consider the following:

(1) The specific Findings of Fact and Conclusions of Law which are the official findings of the Court,⁴ did not use the terms "joint venture" or "partnership".

(2) Other findings by the Court specifically negative the possibility of a true joint venture as that term is used by IRC §761(a). For example:

(a) ". . . (Appellee) . . . has never entered into any written or oral partnership agreement or signed a partnership tax return in connection with venture hereinafter considered. . . ." (R. 20.)

³In *Pence v. Berry*, 13 Wash. 2d 564, 125 P.2d 645 (1942), the Court extended the term "joint venture" to the sharing of expenses of an automobile trip to a college football game. The Court said: "The joint venture, as a useful legal device, is therefore not limited to strictly business transactions, but may also find application in connection with enterprises having the attainment of pleasure as their sole objective, so long as the association of the parties is not motivated merely by a desire for social companionship."

See also, Taubman, *The Joint Venture and Tax Classification*, Federal Legal Publications, Inc., New York, 1957, where it was said at page 99: "The terms of the relationship, other than the fact of profit sharing, may be so shadowy that it might easily be considered something else; e.g., a debtor-creditor transaction, a brokerage agreement, an employment contract, an independent contractor agreement, an agency, or a lease."

⁴Fed. Rules Civil Proc. No. 52.

(b) "Said trust property was conveyed to (Appellee) without any oral or written conditions attached thereto." (R. 23.)

(c) Appellee held her interest as tenant in common and not as tenancy by co-partnership. (R. 9, 22.)

(d) Property taxes and interest were paid by each individual tenant in common, including Appellee, in proportion to his or her interest in the property, and were not paid by any entity. (R. 23.)

(e) "... George W. Williams, as trustee, did not commit the trust for the benefit of the Plaintiff (Appellee), or the Plaintiff, to a purpose of holding property for sale to customers in the ordinary course of a trade or business." (R. 24.)

(f) "... (Appellee) is not a member of any partnerships dealing in real estate and has no background or pattern of real estate activity or employment." (R. 16.)

(g) Appellee "knew nothing about it;" (i.e., an intention by a group or joint venture to which Appellant alleges she belonged to develop the land through a corporation).

(3) Appellee did not even know and had never met at least three of her supposed partners or joint venturers. (R. 119.) Any joint venture or partnership would have had to be an involuntary one as far as Appellee was concerned.

(4) There has been no suggestion by the Court or the Appellant that a partnership tax return should

have been filed, although the law would have required one had there been a true joint venture in existence.

(5) The District Court, in its Memorandum Opinion, stated:

“The intent and purpose of participants in a joint venture, which contemplates a sale of their respective realty interest to an ultimate purchaser, as in this case a development company, might be quite different one from another. For some it may be just a step in carrying on their business; for others it may be merely *a single opportune investment* with a view of ultimate profit but unrelated to any business of the participant, as in the case of the plaintiff here. *In the absence of a true business partnership for the purpose of the transaction, which the court finds did not exist here*, the intent and purpose of the former category are not imputed to the latter category, nor does the situation of the former for tax purposes necessarily determine the situation of the latter.”
(Emphasis ours.)

This paragraph *clearly* indicates that the trial Court was using the term “joint venture” as synonymous with “joint investment” or “joint ownership” and not as synonymous with a business partnership or undertaking. A partnership is an association of two or more persons to carry on as co-owners a business for profit. (California Corp. Code, §15006.) A joint venture is generally defined as a partnership for one particular undertaking. While the definition of “partnership” for tax purposes may be broader than the definition for state law purposes, nevertheless, the

ingredient of carrying on a business is found in all the cases.

The distinction between a (true) joint venture or partnership and joint ownership is now well recognized, and the latter is held not to have the tax incidents of a partnership. *Estate of Edgar Appleby*,⁵ 41 B.T.A. 18 (1940) Aff'd 123 F.2d 700 (C.C.A. 2, 1941).

Before a tenancy in common can be converted into a joint venture or partnership, there must be an *affectio societatis*;⁶ i.e., an intention to form such an entity. Although this intention must be ascertained from all the facts rather than from what the parties say, it is clear that in the present case no evidence points toward an intention by Appellee to be a mem-

⁵Also, see: *Amy Gilford*, 201 F.2d 735 (CA 2, 1953), affirming 11 TCM 175 (1952), where taxpayers unsuccessfully asserted that a tenancy in common constituted a partnership in order to preserve a capital loss carryforward.

Daniel S. W. Kelly v. Commissioner, 16 TCM 34 (1955), where taxpayer asserted that a tenancy in common constituted a partnership to impute misappropriated income which he recovered in a suit against his co-tenant to the year, now barred by the statute of limitations, in which it had been earned by the "partnership."

Lena Hahn, 22 TC 212 (1954), where taxpayer asserted that tenancy in common constituted a partnership so that only the distributive share was gross income for purposes of the \$600 income test for dependents.

Coffin v. U. S., 120 F. Supp. 9 (D.C., Ala., 1954), where taxpayer unsuccessfully asserted that he sold a partnership interest rather than his tenancy in common interest in certain real estate.

Charles E. Tibbals, 17 TCM 228 (1958), where the Commissioner asserted that the purchase, development and sale of 435 lots by two brothers who held title as tenants in common constituted a partnership, but the court held that no partnership was intended or existed, upholding capital gain treatment.

⁶Taubman, *The Joint Venture and Tax Classification*, pp. 349, Federal Legal Publications, 1957, New York.

ber of a joint venture, the existence of which she was not even aware. (R. 15.) In *Charles E. Tibbals v. Commissioner*, 17 TCM 228 (1958), the Tax Court rejected the argument of the Commissioner that taxpayer, who was a tenant in common with his brother, (who was in the real estate business) had formed a joint venture. The Court said:

“The principles adopted by the courts for determining whether a partnership exists for tax purposes are equally applicable in ascertaining the existence of a joint venture. The question whether the parties really and truly intended to join together to carry on a business as partners depends upon their intention. Their intention is a question of fact to be determined from testimony disclosed by their ‘agreement’ considered as a whole and by their conduct in execution of its provision. *Commissioner v. Culbertson*, 337 U.S. 733.”

Appellee could have had no intent to form a joint venture with people she did not even know merely because of her receipt by gift of an interest in land. (R. 119.) To hold otherwise would make a partnership interest a servitude which runs with the land rather than a voluntary undertaking.

Even if it were held that the *trust* for the benefit of the Appellee became a member of a joint venture in April or May of 1953 and that George Williams’ intent would be imputed to it, it does not follow that the same intention would run to Appellee, who later received her interest unconditionally and without knowledge of any commitments in regard to the land.

The intent of a prior owner in a chain of title to hold property for sale to customers in the ordinary course of a trade or business is not imputed to the transferee of that property.⁷

In the companion case⁸ to this case, the Tax Court said:

“It is our conclusion after considering all of the evidence and after having heard and weighed the testimony of all the witnesses—and we have hereinabove found as an ultimate fact—that petitioner did not, at any time, hold her 1 per cent undivided interest in the San Bruno lands primarily for sale to customers in the ordinary course of a trade or business; and we further conclude, that *she may not properly be regarded, by imputation or otherwise, to have been a member of any business organization which was, during the period when she owned her 1 per cent*

⁷*Garrett v. U. S.*, 120 F. Supp. 193 (Ct. Cl., 1954), where the intent of decedent, a subdivider, was not imputed to his estate, even though the executor retained decedent's real estate office and the will authorized such activity.

James G. McConkey v. U. S., 130 F. Supp. 612 (Ct. Cl. 1955), where heirs of a mortgagee who repossessed property were not held to be bound by the intent of the mortgagor, who was a subdivider.

Western and Southern Life Insurance Company v. U. S., 163 F. Supp. 827 (Ct. Cl. 1958), where the intent of a subsidiary to hold property for sale to customers was not imputed to the parent corporation, which received the property on liquidation of the subsidiary.

Louis Greenspon v. Commissioner, 229 F. 2d 947 (8th Cir., 1956), which held that the shareholders were entitled to capital gain treatment on sale of inventory property distributed to them from a corporation, even though the case describes them as “liquidating agents for the corporation” and even though they continued to be shareholders in other corporations which sold the same type of property.

⁸*Katherine Anne Berryman v. Commissioner*, 37 T.C. No. 7 (1961).

undivided interest, holding the land for sale to customers in the ordinary course of a trade or business. Thus it follows, and we here hold, that the petitioner's gain here involved is long-term capital gain from the sale of a capital asset." (Emphasis added.)

In light of the above, it is submitted that the District Court did not find that Appellee was a member of a joint venture in the sense that the term "joint venture" is used in IRC §761(a).

C. EVEN IF APPELLEE WERE HELD TO BE A MEMBER OF A JOINT VENTURE, THE (ASSUMED) INTENTION OR PURPOSE OF OTHERS TO HOLD THE PROPERTY FOR SALE TO CUSTOMERS IN THE ORDINARY COURSE OF A TRADE OR BUSINESS WOULD NOT BE IMPUTED TO HER. THE INTENTION OR PURPOSE OF THE INDIVIDUAL PARTNER IS CONTROLLING OF THE TAX EFFECTS UNDER IRC §702(b), NOT THE (SUPPOSED) INTENTION OF THE ENTITY.

Even if Appellee were held to be a member of a joint venture, the (assumed) intention or purpose of others to hold the property for sale to customers in the ordinary course of a trade or business would not necessarily be her intention and cannot be imputed to her merely because of the relationship.⁹

⁹It should be noted in any discussion of "imputed intention" that the assumption by the District Court that George W. Williams held his fractional interest as property other than a capital asset was an assumption for purposes of judicial economy only. It is not conceded that George W. Williams and other co-owners, as individuals, were dealers in real property. The legal argument is merely made that, even assuming they were and had the intention to hold this property for sale to customers in the ordinary course of a trade or business, such intention is not imputed to Appellee.

Internal Revenue Code §702(b) in effect at all material times provided:

“The character of any item of income, gain, loss, deduction or credit included in a partner’s distributive share under paragraphs (1) through (8) of subsection (a) shall be determined as if such item were realized directly from the source from which realized by the partnership or incurred in the same manner as incurred by the partnership.”

It is clear from a reading of the legislative history of this provision that the partnership is merely a conduit through which pass various items realized by the partners, and the character of the items is determined at the level of the individual partner, not at the partnership level. While the partnership is an entity for purposes of filing an information return and making certain elections, (e.g., the election to report on the installment basis) that the character of the item is determined at the individual partner’s level is not open to serious doubt. Thus, a dealer in real property could not avoid ordinary income reporting by running title through a partnership which had not theretofore been in the real estate business.

The business activity of the partnership is important only in that it is one component in determining whether the partner is in the business of holding property for sale to customers in the ordinary course of a trade or business.

Senate Report No. 1622, accompanying HR 8300, 83rd Congress, Second Session (the Internal Revenue Code of 1954), provides at page 89:

“(a) Income of Partners—under the House and your Committee’s bill, as under present law, partners will be liable individually for income tax on their distributive shares of partnership income. The partnership will act as a mere conduit as to income and loss items transferring such items directly to the individual partners.

“The items required to be segregated retain their original character in the hands of the partner as though they were realized directly by him from the source from which they were realized by the partnership and in the same manner.”

In the “Detailed Discussion of the Technical Provisions of the Bill”, accompanying said Senate Committee Report, it states at pages 376 and 377:

“Subsection (b) contains a ‘conduit’ rule which makes clear that the character of any item realized by the partnership and included in the partner’s distributive share, shall be the same as though he had realized such income directly, rather than through his membership in the partnership, from the source from which it was realized by the partnership and in the same manner.”

The House of Representatives Report accompanying HR 8300, House Report No. 1337, 83rd Congress, Second Session, page A222, is verbatim with the discussion accompanying the Senate Finance Committee Report.

Thus, Appellant’s basic statement of law on which the appeal is based is erroneous; namely, that the determination of whether an asset is a capital asset or

is held for sale to customers in the ordinary course of a trade or business is made at the partnership level rather than the partner level. A reading of the Code, Regulations, and the legislative history make this clear.

In a somewhat different but relevant case, this Court has expressly recognized the "conduit" theory and that the character of items sold by the partnership has its impact at the individual partner's level. *Commissioner v. Paley*, 232 F.2d 915 (C.A. 9, 1956).

D. IF IT IS DECIDED THAT THE TRIAL COURT HELD APPELLEE TO BE A MEMBER OF THE JOINT VENTURE AND THE INTENT OF OTHERS IS THEREBY IMPUTED TO HER, THE CASE MUST BE REMANDED FOR RETRIAL BECAUSE THE ONLY EVIDENCE SUPPORTING THIS CONCLUSION WAS IMPROPERLY ADMITTED INTO EVIDENCE WITHOUT FOUNDATION AND OVER OBJECTION OF APPELLEE'S COUNSEL.

If it should be decided by this Court that Appellee was a member of a joint venture and that her membership therein was sufficient to impute the intent of other members to her, then the case must be remanded to the trial Court for retrial. The only evidence upon which the existence of or membership in a joint venture could be based is a certain Memorandum,¹⁰ dated May 23, 1953, which was admitted into evidence to establish Appellee's membership in a joint venture over objection that no foundation had been laid for the existence of a joint venture and that it was irrelevant, imma-

¹⁰Said Memorandum is set forth in Appendix B.

terial and hearsay as to Appellee. (R. 80, 82, also 78, 79, 81, 83.)

Furthermore, counsel for Appellee later moved to strike said Memorandum on the same grounds and filed with the Court its Memorandum of Points and Authorities,¹¹ which was made a part of the trial record. (See R. 120, where the transcript erroneously refers to Exhibit B as Exhibit D.)

The District Court stated that if it did not find there was a joint venture *as to Appellee* (which it did not) that Exhibit B would be stricken from the record, which was not done. (R. 120.)

Likewise, this Court, on July 6, 1961, denied Appellee's motion to expunge said exhibit from the record.

If it is regarded that said exhibit is a part of the record for evidentiary purposes, then it was improperly admitted over objection, the motion to strike was improperly denied, and the case must be remanded for retrial.

If said Exhibit B is part of the record on appeal only for purposes of determining the correctness of the District Court's ruling, then it is not in evidence and cannot be considered as evidence to determine the correctness of the decision below. In this event, the decision of the District Court must be affirmed on the basis that the evidence overwhelmingly supports the decision of the trial Court.

¹¹Pertinent portions of the Memorandum of Points and Authorities are set out in Appendix C.

VIII. SUMMARY

The question presented in this case was one of fact. The evidence shows that the judgment of the District Court was not “clearly erroneous” but actually shows that no other decision was possible. The record likewise supports the findings and conclusions of the District Court that Appellee was not a member of a joint venture as the term is used in IRC §761(a), and even if she were, the intent of others was not imputed to her. Furthermore, as a matter of law, there would be no imputation of intent, since the tax characterization to partner in a partnership holding and selling property is made at the partner level; the partnership is deemed merely a conduit through which title passed.

The *only* evidence to support a partnership was improperly admitted, and if the case is to be reversed it must be remanded for retrial because of this error.

Dated, San Francisco, California,

November 3, 1961.

Respectfully submitted,

EUGENE J. BRENNER,

HARRY L. FREEMAN,

Counsel for Appellees.

(Appendices A, B and C Follow)

Appendices.

Appendix A

Internal Revenue Code of 1954 (26 U.S.C.): SEC. 702. INCOME AND CREDITS OF PARTNER.

(a) GENERAL RULE.—In determining his income tax, each partner shall take into account separately his distribute share of the partnership's—

(1) gains and losses from sales or exchanges of capital assets held for not more than 6 months,

(2) gains and losses from sales or exchanges of capital assets held for more than 6 months,

(3) gains and losses from sales or exchanges of property described in section 1231 (relating to certain property used in a trade or business and involuntary conversions),

(4) charitable contributions (as defined in section 170(c)),

(5) dividends with respect to which there is provided a credit under section 34, an exclusion under section 116, or a deduction under part VIII of subchapter B,

(6) taxes, described in section 901, paid or accrued to foreign countries and to possessions of the United States,

(7) partially tax-exempt interest on obligations of the United States or on obligations of instrumentalities of the United States as described in section 35 or section 242 (but, if the partnership elects to amortize the premiums on bonds as provided in section 171, the

amount received on such obligations shall be reduced by the reduction provided under section 171(a)(3)),

(8) other items of income, gain, loss, deduction, or credit, to the extent provided by regulations prescribed by the Secretary or his delegate, and

(9) taxable income or loss, exclusive of items requiring separate computation under other paragraphs of this subsection.

(b) **CHARACTER OF ITEMS CONSTITUTING DISTRIBUTIVE SHARE.**—The character of any item of income, gain, loss, deduction, or credit included in a partner's distributive share under paragraphs (1) through (8) of subsection (a) shall be determined as if such item were realized directly from the source from which realized by the partnership, or incurred in the same manner as incurred by the partnership.

Source: New.

(c) **GROSS INCOME OF A PARTNER.**—In any case where it is necessary to determine the gross income of a partner for purposes of this title, such amount shall include his distributive share of the gross income of the partnership.

SEC. 761. TERMS DEFINED.

(a) **PARTNERSHIP.**—For purposes of this subtitle, the term “partnership” includes a syndicate, group, pool, joint venture, or other unincorporated organization through or by means of which any business, financial operation, or venture is carried on, and which is not, within the meaning of this title (sub-

title), a corporation or a trust or estate. Under regulations the Secretary or his delegate may, at the election of all the members of an unincorporated organization, exclude such organization from the application of all or part of this subchapter, if it is availed of—

(1) for investment purposes only and not for the active conduct of a business, or

(2) for the joint production, extraction, or use of property, but not for the purpose of selling services or property produced or extracted, if the income of the members of the organization may be adequately determined without the computation of partnership taxable income. . . .

* * * * *

SEC. 1221. CAPITAL ASSET DEFINED.

For purposes of this subtitle, the term “capital asset” means property held by the taxpayer (whether or not connected with his trade or business) but does not include—

(1) stock in trade of the taxpayer or other property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year, or property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business;

* * * * *

REGULATIONS

Reg. (TD 6175, filed 5-23-56). §1.702-1 *Income and credits of partner.*—(a) *General rule.* Each partner is required to take into account separately in his re-

turn his distributive share, whether or not distributed, of each class or item of partnership income, gain, loss, deduction, or credit described in subparagraphs (1) through (9) of this paragraph. (For the taxable year in which a partner includes his distributive share of partnership taxable income, see section 706(a) and §1.706-1(a). Such distributive share shall be determined as provided in section 704 and §1.704-1). Accordingly, in determining his income tax:

(1) Each partner shall take into account, as part of his gains and losses from sales or exchanges of capital assets held for not more than six months, his distributive share of the combined net amount of such gains and losses of the partnership.

(2) Each partner shall take into account, as part of his gains and losses from sales or exchanges of capital assets held for more than six months, his distributive share of the combined net amount of such gains and losses of the partnership.

* * * * *

(b) *Character of items constituting distributive share.* The character in the hands of a partner of any item of income, gain, loss, deduction, or credit described in section 702(a)(1) through (8) shall be determined as if such item were realized directly from the source from which realized by the partnership or incurred in the same manner as incurred by the partnership. For example, a partner's distributive share of gain from the sale of depreciable property used in the trade or business of the partnership shall be considered as gain from the sale of such depreciable

property in the hands of the partner. Similarly, a partner's distributive share of partnership "hobby losses" (section 270) or his distributive share of partnership charitable contributions to churches, educational organizations, or hospitals, (section 170(b)(1)(A)) retains such character in the hands of the partner.

* * * * *

Appendix B

MEMORANDUM

April 23, 1953

South San Francisco

Re: San Bruno Lands Incorporated

Today at a meeting of George Williams, Martin Wunderlich, Andrew Conway and Thomas Culligan, with Robert Crane also present, the parties discussed the purchase of San Bruno Lands Incorporated, a California Corporation and determined that they would make the purchase if the sale could be consummated with the present stockholders, and that the following plan would be carried out.

It is understood that the individuals present were representing various other interests, such as controlled corporations, ~~trusts for their children~~, and etc., but that the only parties with whom each would have to deal would be George Williams, Frank Burrows, Andrew Conway, Thomas Culligan and Martin Wunderlich. That these individuals controlled the interests which they represented and were in a position to make all necessary decisions for these interests.

An agreement is to be prepared for the purchase of the stock, with Conway and Culligan contributing \$116,666.00, Williams and Burrows \$233,333.00 and Wunderlich contributing \$350,000.00. The balance of the purchase shall be obtained by a loan of approximately \$750,000.00 from the American Trust Company, with \$250,000.00 being paid off upon the liquidation of San Bruno Lands and \$500,000.00 by a loan in

that amount from the San Francisco Bank secured by a Deed of Trust on all the property. The property shall be owned by the parties hereto as tenants-in-common with the interests of each in proportion to contribution. Mr. Gasser, the representative of the present stockholders of San Bruno Lands, shall be contacted immediately and an attempt made to work out the terms of purchase of all of the stock of that Company. Negotiations will attempt to have present condemnation proceedings, 15 acres for school and 40 or 50 acres for the Wherry Housing Act, consummated before title to the stock is transferred. If this cannot be done, the Corporation will be liquidated immediately on purchase of all the stock and the Wherry Housing Act Condemnation stalled for six months. The parties are all flexible and will go along with whichever or whatever arrangement seems the most desirable or which can be worked out.

After the San Bruno Lands Company's (sic) liquidated, whether this be immediately upon acquisition or after a six months' holding period, with this question to be determined upon further consideration, parties shall for (sic) a development corporation with the stock holdings in that development corporation as follows:

Williams and Burrows	$\frac{1}{3}$ interest
Conway and Culligan	$\frac{1}{3}$ interest
Wunderlich	$\frac{1}{3}$ interest

This corporation will be so organized that it will be in a position to buy the real property from the indi-

vidual owners and allow the individual owners to take a capital gain. The development corporation, or a series of development corporations organized on the same basis, will purchase, either in one piece or in several parcels over a period of time, all of the real property which was formerly owned by San Bruno Lands Incorporated except the approximate 142 acres, commonly known as the "Navy Piece". The development corporation will pay for said land an average of \$2000.00 per acre, which sum may vary with the individual parcels but which shall meet that average by the time all the property has been purchased. The Navy Parcel will be held by the individuals or their interests in the same proportion as their original contribution. The parties have all agreed that the above transactions be carried out in a manner which is most advantageous tax-wise.

The parties intend that the development company or companies will develop the real property by the construction of homes and the development of business areas. However, the parties further anticipate certain acreage will be sold to outside parties as soon as the capital gain can be realized so that the original loan to the San Francisco Bank can be retired as quickly as possible.

TJC
MW
FFB
AJC
MHW

(N.B. The copy admitted into evidence of the above exhibit was a carbon copy initialed on the first page by four and on the second page, by five of the parties thereto. On the first page, the words "trusts for their children" were stricken out and three of the initials appear in the margin opposite thereto. Note the difference between this and Appendix C in Appellant's Brief, which does not indicate that said words had been stricken.)

Appendix C

MEMORANDUM OF POINTS AND AUTHORITIES
RE NONADMISSIBILITY OF "MEMO OF APRIL 23, 1953"
MARKED EXHIBIT B FOR IDENTIFICATION HEREIN

. . .

The testimony shows that a document exists which refers to the purchase of the stock in San Bruno Lands, Incorporated and ultimate acquisition of its property. It was entitled "Memorandum, Re: San Bruno Lands, Incorporated, April 23, 1953, South San Francisco, Calif." The testimony also establishes that said document was not signed, that it was initialed by the parties, that it makes no reference to the plaintiffs herein, that they did not sign or initial it, that it does not purport to bind plaintiff, Lois W. Rosebrook, that it was acquired by the revenue agent from a file in Culligan Development Company offices.

II

SAID DOCUMENT IS NOT ADMISSIBLE IN EVIDENCE FOR
THE FOLLOWING REASONS:

A. The Memorandum Is Hearsay as to Plaintiff

Hearsay is testimony or documentary evidence submitted to support the truth of the statements contained therein which is being given other than by the person who has purported to have authored the binding statements. Plaintiff herein was not a party to this memorandum; indeed did not know of its existence. The statements contained therein are hearsay as to her.

1. *Parish's Estate v. C.I.R.*, 187 F.2d 390 (C.A.-7, 1951), 40 A.F.T.R. 286, 1951-1 U.S.T.C. Paragraph 10, 794.

...

Plaintiff in the present case is no more an author of the statements which defendant seeks to admit than the decedent or his executor were of the statements in the affidavits or letters in the *Parish's Estate* case. As to plaintiff, Lois W. Rosebrook, they are hearsay.

2. *Niederkrome v. the Commissioner*, 266 F.2d 238 (C.A.-9, 1958), 2 A.F.T.R. 2d 6155, 58-2 U.S.T.C. Paragraph 9944. Cert. den. 359 U.S. 945 (1959).

...

... The 9th Circuit said:

"... It is obvious such an affidavit was not in itself admissible under these rules. Even if this document were admissible, it laid no foundation for the introduction of the minutes . . . *against taxpayers who were not present, even according to the purported minutes.* The whole recorded transaction was one between the parent corporation and its Oregon subsidiary. There was no proof that the record was made in the regular course of business . . .

"... *the transaction had not been consummated when this supposed meeting was held and was only in the negotiation stage.* It was never carried out in the form here outlined . . .

"... This writing purports to be nothing but the record of a transaction between parent and subsidiary corporations. At best, it is an interoffice memorandum . . . In any event, the taxpayers who are sought here to be charged were *neither*

parties to the transaction purportedly recorded nor to the conversation set down . . .

“On account of these errors, the cause must be reversed and remanded . . . There are questions of fact involved which that tribunal should determine without placing extra burdens on taxpayers . . . And it is difficult to explain how the taxpayers could avoid prejudice in attempting to overcome the contents of the purported minutes, *which were pure hearsay as to all parties in this case.* Judicial officers should have attached no weight or importance to this exhibit.” (Emphasis added.)

. . .

Many similarities between the incompetent minutes in the *Niederkrome* case and the incompetent memorandum in the current case exist. They are:

- a. Neither document refers to or purports to bind the taxpayer involved.
- b. Neither party was an author of the document or a signatory thereto.
- c. There is no evidence that either document was made in the regular course of the business of either taxpayer or the parties who purport to be bound thereby.
- d. Transactions referred to were not consummated at the time the document was drawn and never carried out in the form outlined.

3. *Standard Oil Co. of Calif. v. Moore*, 251 F.2d 188 (C.A.-9, 1957). Cert. den. 356 U.S. 975.

Niederkrome involved admissibility of corporate minutes under 28 U.S.C.A. Sec. 1732, commonly

known as the Federal Business Records Act. The minutes were excluded from evidence because the proponent sought to admit them to bind a third party (as here) who was not a signatory or party to the minutes, nor whose company recorded them. *Niederkrome* cites what is now the landmark in this area, *Standard Oil of California v. Moore*, also decided by the Ninth Circuit, to which this case would go, if appealed.

. . .

“It follows that a writing which does not pertain to a matter in which the business was a direct participant, but to some incident, circumstance, or activity outside that business, is not a memorandum or record of an ‘act, transaction, occurrence, or event’ within the meaning of the statute.”

Since the writings sought to be admitted concerned the marketing policies of companies *other than the one in whose files the writing was found*, they were not admissible.

. . .

B. The Memorandum Is Not Relevant

1. See the *Parish*, *Niederkrome* and *Moore* cases cited above. It has no logical tendency to establish the matter sought to be proved, *as to this plaintiff*.

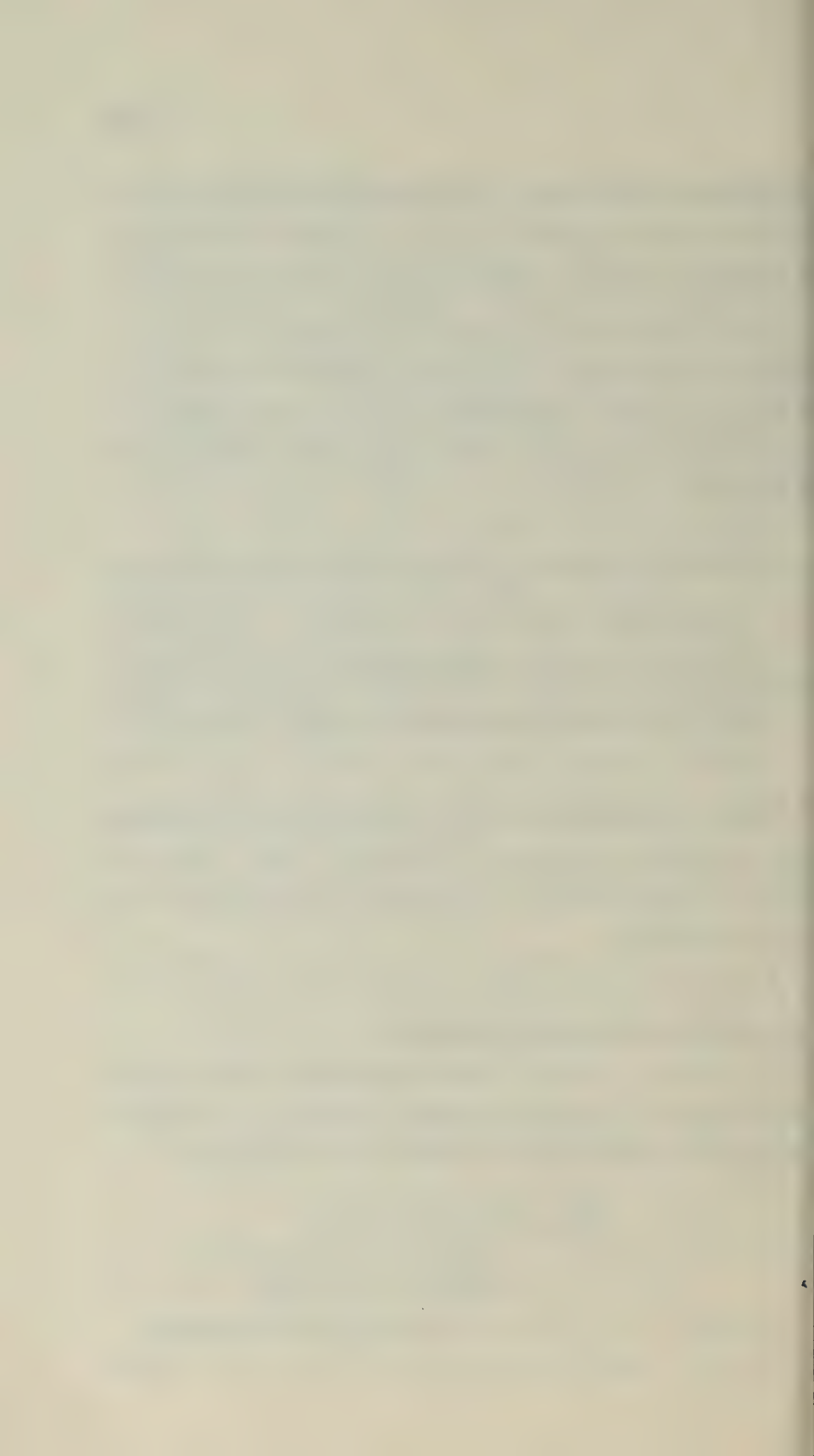
. . .

Respectfully submitted,

Eugene J. Brenner,

Harry L. Freeman,

Attorneys for Plaintiffs.



No. 17,387

IN THE

United States Court of Appeals
For the Ninth Circuit

UNITED STATES OF AMERICA,	} <i>Appellant,</i>
vs.	
CHARLES E. and LOIS W. ROSEBROOK,	
	} <i>Appellees.</i>

On Appeal from the Judgment of the United States District
Court for the Northern District of California

REPLY BRIEF FOR THE APPELLANT

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Appellees.

On Appeal from the Judgment of the United States District
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REPLY BRIEF FOR THE APPELLANT

I

THE ISSUE PRESENTED BY THIS APPEAL IS WHETHER
THE DISTRICT COURT ERRED IN APPLYING THE LAW
RELATING TO JOINT VENTURES AND NOT, AS TAX-
PAYER CONTENDS, WHETHER THE EVIDENCE SUP-
PORTS THE FINDINGS

The taxpayer attempts to avoid the issue presented by this appeal by contending (Br. 8-11) that the question involved is merely whether there is adequate evidence to support the District Court's finding that she was not personally engaged in the business of selling real estate. In so arguing and in asking this Court to

decide the case on that issue, the taxpayer ignores (and asks the Court to ignore) both the facts relating to the joint venture and the Government's contention that the court below erred in applying the law of joint ventures. Contrary to taxpayer's assertion, this case cannot be described as one merely involving a (Br. 11) "simple question of fact in which the District Court's decision is adequately supported by the record" for the Government does not challenge the findings; rather the case must be decided on the question of whether the District Court correctly determined the legal and tax consequences of the taxpayer's participation in the joint venture.

II

TAXPAYER'S SUGGESTION THAT THE DISTRICT COURT DID NOT MEAN WHAT IT SAID IN USING THE TERM "JOINT VENTURE" IS WITHOUT MERIT

The taxpayer suggests (Br. 11-19) that the District Court, in holding that the San Bruno land was acquired and sold pursuant to a joint venture, did not use that term in its accepted sense of an undertaking for profit but rather meant "joint ownership". We submit that the taxpayer has placed an alien meaning on the term which the courts have carefully avoided and which, as a reading of the opinion below demonstrates, was not used by the District Court.

The land here was nominally held by the venturers as tenants in common. If the court below had intended to hold that there was only joint ownership, we sub-

mit that it would simply have held that the parties were co-tenants, and would have avoided a term of art such as joint venture. Moreover, on taxpayer's motion (R. 110) to strike defendant's Exhibit B the court ruled (R. 120) that it would strike the exhibit only if it found that there was no joint venture or agency relationship between taxpayer and her father. Since the court not only did not strike exhibit but relied on it in its opinion and findings of fact, the court obviously found that there was a joint venture in the sense of joint enterprise empowering one venturer to act on behalf of and for another.

The principal distinction between joint ownership and joint venture is that in the former there is no intent to engage in a joint enterprise. *Gilford v. Commissioner*, 201 F. 2d 735 (C.A. 2d); *Henning v. Cox*, 148 F. 2d 586 (C.A. 5th); *Estate of Appleby v. Commissioner*, 41 B.T.A. 18, affirmed on other grounds, 123 F.2d 700 (C.A. 2d); 30 Am. Jur. Joint Adventures, Sec. 5.

The April 23, 1953, memorandum (Appendix C)¹, relied upon by the court below as a correct expression of the parties' intentions, shows that they intended to engage jointly and in concert in buying and selling the San Bruno tract. The memorandum states how the parties planned to acquire the San Bruno tract; that they planned to sell none of it until the six

¹This reference is to Appendix C of the Government's main brief. Through a typographical error, the phrase "trusts for their children" was not lined out in Appendix C, although the copy of the memorandum introduced in evidence did contain this lined alteration.

months capital gain holding period had elapsed; that they planned to sell it to a corporation to be controlled by the principal parties involved and to sell some of it to outside parties; that the corporation would subdivide some of the land and would also use some for construction of business areas. The memorandum further stated that the parties agreeing thereto represented other interests which they controlled and for whom they were acting;² that all parties were flexible and would go along with whatever future course of conduct was desirable or could be worked out; and that all transactions would be carried out in the most advantageous tax manner.

The common enterprise outlined in the memorandum had all the elements of a joint venture: there was a community of interest in the enterprise, a sharing of profits and losses³, joint participation in the affairs of the venture⁴, and a close relationship between the

²Plaintiff's Ex. 2 lists the following persons as participants as of June 30, 1955 (other than those named in the memorandum): Gerhard J. Bundlie, trustee of four trusts; Frank F. Burrows, trustee of one trust; Katherine Anne Williams; Lois Williams Rosebrook; George Wesley Williams III; Conway & Culligan Development Co.; American Homes Development Co.; G. W. Williams Co.

³The right to share profits implies a sharing of losses. *Nels E. Nelson, Inc. v. Tarman*, 163 C.A. 2d 714, 726, 329 P.2d 953, 958-959. However, the probability of losses under this joint venture, which was committed to selling the land at a fixed price to a particular buyer (Consolidated), was rather remote.

⁴The venturers do not have to have equal control over the conduct of the enterprise. *Foster v. Keating*, 120 C.A. 2d 435, 452, 261 P.2d 529, 539. And the venturers, as in this case, may grant authority to one or more of their number to act for them. *Stilwell v. Trutanich*, 178 C.A. 2d 614; 3 Cal. Rptr. 285. See defendant's Exhibit E, which is a power of attorney to three of the venturers to act for the venture.

parties. *Lasry v. Lederman*, 147 C.A. 2d 480, 485-488, 305 P.2d 663, 666-667; *James v. Herbert*, 149 C.A. 2d 741, 748, 309 P.2d 91, 95. The necessary intent of the parties to form a joint venture (*Lasry v. Lederman, supra*; *Haley v. Commissioner*, 203 F.2d 815 (C.A. 5th)) is found in both the April 23rd memorandum as well as in the parties' conduct in jointly selling 884 acres to Consolidated on February 10, 1954, and 80 acres in August, 1956, and in jointly leasing the property, banking the rents, and paying expenses. (R. 23-24.) The District Court's finding that there was a joint venture or enterprise (and not merely joint ownership) is amply supported by the facts.⁵

There is no question that taxpayer's trust was a member of the venture. The trust was one of the controlled interests referred to in the April 23rd memorandum and was represented by taxpayer's father, the trustee. Taxpayer's father, George Williams, as trustee, invested \$7,000 of trust funds in the venture; as trustee, he also executed, along with the other venturers, a power of attorney (Deft. Ex. E) to three of their number (one of which was himself) for management of the venture. (R. 21-22.) On the trust's dissolution, therefore, taxpayer as beneficiary received the property that the trust held, which included *inter alia*

⁵This finding is in the court's opinion. (R. 14, 17.) As pointed out in our main brief, the court erroneously reasoned that because the parties formed a joint venture and not a partnership, the taxpayer must prevail (although it indicated that the Government would have prevailed had there been a partnership (R. 17)). The court apparently did not think it necessary therefore to include in its findings of fact and conclusions of law more than its holding (R. 25) that there was no partnership.

an interest in the joint venture. Manifestly, she did not receive something that the trust itself did not possess, i.e., she did not receive the ownership of an interest in the land independent of the joint venture.⁶

Even if the taxpayer's father did not inform her when he dissolved the trust that she was receiving an interest in a joint venture which was obligated to sell substantially all of its land to Consolidated, and that a sale was impending, taxpayer was bound by her trustee's acquisition of an interest in the venture and hence by the venture's purposes and commitments. *Werner v. United States*, 188 F.2d 266 (C.A. 9th). In any event, taxpayer ratified and accepted the acts of her father as trustee. (Joint Ex. 5-E.) Moreover, as a practical matter, there was no doubt that taxpayer (who had little knowledge of real estate) would follow her real estate-dealer father's suggestion with respect to sales by the venture to Consolidated. (R. 50, 53, 56-58, 94-95.)

It should also be noted that after the trust was dissolved and taxpayer received her interest in the venture in her own name, she fully participated in, and was accepted by, the venture.⁷ She consented to the collection of rents by Mr. Crane (the venture's manager) and the deposit of these amounts in a com-

⁶The fact that the land was held by the venturers (including successively the trust and then the taxpayer) as tenants in common is of no significance because the principles of joint venture apply irrespective of how title to the property is taken. *Larson v. Thoreson*, 36 C.2d 666, 226 P.2d 571.

⁷Taxpayer even referred to her fellow participants in the venture as "members". (R. 56.)

mon bank account from which various items of expense were paid; she and the other venturers forwarded their proportionate share of taxes and interest to Mr. Crane for payment, received semi-annual statements of the venture's financial status, and other intermittent reports; taxpayer even participated in the conduct of the enterprise by notifying Crane that a proposed sale of top soil was being made at too low a price. Most importantly, taxpayer joined with the other venturers in the August, 1956, sale of 80 acres to Consolidated for construction of a shopping center. (R. 23-24, 39, 41, 55-56, 58-59; Pltf. Ex. 2.)

Taxpayer seeks to find support in the recent Tax Court's decision in *Berryman v. Commissioner*, 37 T. C. No. 6, for her argument that the court did not mean joint venture when it used that term. *Berryman* involved taxpayer's sister who also received a one percent interest in the San Bruno joint venture upon dissolution of a trust for her benefit. The Tax Court held that Mrs. Berryman's income from the sale to Consolidated was capital gain and not ordinary income, relying heavily on the District Court's opinion and findings in the case at bar.

The Commissioner filed a petition for review by this court of *Berryman* on December 21, 1961. Although we have not yet seen the record in *Berryman*, if the facts are substantially the same as those at bar (as the Tax Court's opinion states) it follows that taxpayer's sister and her trust were necessarily successive members of the joint venture and that she too must report her distributive share of the venture's

income from the sale of the 884 acres as ordinary income.

Taxpayer also relies on the District Court's conclusion that she was not holding the property for sale to customers because neither she nor her trust had any interest in Consolidated. This conclusion, we submit, is of little importance in light of the court's finding that taxpayer was a member of a joint venture and of its holding with respect to the purpose of the principal and active venturers. (R. 14-15, 17.)

The purpose of the active members of the venture, as the court found (R. 14-15, 17), was to subdivide and sell part of the San Bruno tract through use of Consolidated. The active venturers were all otherwise engaged in the real estate subdivision business. (R. 14.) The court properly recognized that in acting together to buy the land for subdivision by them through Consolidated the active members were engaging in the conduct of that business, albeit jointly. The trial court quite accurately described the venture's function as a "step in carrying on their business" (R. 17) and correctly looked to the substance of the entire transaction which is controlling for tax purposes. Significantly, the taxpayer here does not challenge the court's conclusion in this respect.

The court below, however, erroneously held that (R. 17) while the purpose of the active members would be imputed to the inactive participants in their business if there had been a partnership, a different rule applies in the case of a joint venture. In this regard, the court erred, for as we have pointed out in

our main brief (pp. 13-22), there is no difference between a joint venture and a partnership under the tax law.⁸

Taxpayer argues (Br. 19-22), in effect, that the District Court's finding that there was a joint venture does not advance the Government's cause because the intention or purpose of the individual partners is controlling with respect to partnership property. Taxpayer suggests that the character of an item of partnership property is determined in the individual partner's hands rather than in the partnership's hands. Taxpayer quotes and relies on Section 702(b) of the 1954 Code. Although that section is technically not applicable to the sale under consideration,⁹ it is declaratory of prior law, and thus its provisions are relevant to this discussion.

Section 702(b) provides that the character of partnership items of income, gain, loss

shall be determined as if such items were realized directly from the source from which realized by

⁸It should be noted that the purpose of the active venturers with respect to that part of the San Bruno tract purchased for investment purposes is also properly attributable (through the venture) to the inactive venturers. Thus, the 80 acres sold to Consolidated for construction of a shopping center by the principal venturers was not held for sale to customers, and the inactive venturers realized capital gain in participating in the venture and in joining the active members in this investment activity. Taxpayer's reporting of that income as capital gain has not been challenged. (R. 46-47.)

⁹Section 702 is part of Subchapter K of the 1954 Code. That subchapter is generally applicable to partnership taxable years beginning after December 31, 1954, and to any part of a partner's taxable year falling within such partnership taxable year. See Section 771(a) of the 1954 Code. Since the sale here under consideration occurred on February 10, 1954, it clearly is not subject to the 1954 Code provisions.

the partnership, or incurred in the same manner as incurred by the partnership.

We submit that that section, and Section 702(a) which requires the segregation of partnership gain on sale of its capital assets from its ordinary income, and the accompanying Committee Report (also relied on by taxpayer), all clearly reveal that partnership income is originally characterized at the partnership level and then reported by the partner as if he had earned it, and that each partner does not, as taxpayer contends, separately characterize his income from the partnership. The paragraphs from the Committee Report accompanying Section 702 (S. Rep. No. 1622, 83rd Cong., 2d Sess., pp. 89-90 (3 U.S.C. Cong. & Adm. News (1954) 4621, 4722)) which are set forth in the margin show this to be the case.¹⁰

It is interesting to note that taxpayer's position is supported by no case law. *Commissioner v. Paley*, 232 F. 2d 915 (C.A. 9th), certiorari denied, 352 U.S.

¹⁰"The items required to be segregated retain their *original* character in the hands of the partner as though they were realized directly by him from the same source from which realized by the partnership and in the same manner. After excluding the items required to be separately treated, the remaining income or loss, which corresponds to the ordinary income or loss of the partnership under present law, is attributed to the partners.

"The computation of partnership income is generally on the same basis as existing law. The partnership is allowed the usual business deductions, but is denied the deductions peculiar to individuals.

"Both versions of the bill provide that all elections with respect to income derived from a partnership * * * [with one exception] are to be made at the partnership level and not by the individual partners. This rule recognizes the partnership as an entity for purposes of income reporting. *It avoids the confusion which would occur if each partner were to determine partnership income separately for his own purposes.*" (Italics added.)

838, the only case cited by taxpayer with respect to this argument, holds that a partner's distributive share of partnership gains from property used in its trade or business must be offset against the partner's individual losses from property used in his own trade or business. *Paley* not only refutes taxpayer's contention but it supports our position by indicating that the nature of partnership income is determined by the partnership's own trade or business and that the income is characterized in its hands.

We believe that our position in this case not only correctly reflects the law, but that it is equitable in that it treats all taxpayers who are jointly engaged in the same business in the same tax manner.

III

THE MEMORANDUM OF APRIL 23, 1953 WAS PROPERLY ADMITTED IN EVIDENCE BECAUSE IT WAS PROOF OF THE TERMS OF AN AGREEMENT BEARING ON THE ISSUES INVOLVED

The taxpayer complains (Br. 22-23) that the District Court improperly admitted the April 23rd memorandum. The memorandum states and describes an oral agreement reached at a meeting that day (April 23, 1953) of George Williams, Martin Wunderlich, Andrew Conway, and Thomas Culligan, with Robert Crane present. In addition to themselves, these persons were representing various interests including the taxpayer's trust. (Appendix C.) The agreement described in the memorandum, which the Government

successfully contended was a joint venture agreement, supplemented another agreement (which was in writing) of that date (Deft. Ex. A) providing for the purchase of the stock of San Bruno Lands, Inc. by the aforementioned venturers. The memorandum carries initials of the parties thereto on both of its pages. Prior to introduction of the memorandum, Joint Exhibit 2-B was admitted in evidence. That exhibit is the Declaration of Trust by which George and Hortense Williams, taxpayer's parents, created the trust for the benefit of taxpayer. It granted the named trustee, George Williams, broad powers to deal with and invest the corpus.

One of the issues below was whether a joint venture existed with respect to the purchase and sale of the San Bruno land in which taxpayer's father, as trustee, was a member. The memorandum as evidence of that joint venture agreement,¹¹ clearly was admissible and was not hearsay under the well established rule that the terms of an agreement which is in issue under the substantive law may be proved, as Wigmore states (VI Wigmore on Evidence (3 ed.), Sec. 1770), "without violation of the Hearsay rule because they are not offered to evidence the truth of the matter that may be asserted therein."

In *Paddock v. United States*, 79 F. 2d 872, 874, this Court held that statements between the taxpayer and his daughter were admissible because they fixed the

¹¹It should be noted that George Williams identified his initials on both pages of the memorandum thus authenticating it (R. 82), and that a copy was offered pursuant to a stipulation among counsel that copies could be admitted in evidence (R. 79).

terms of an employment contract, the existence of which was germane to the question of taxpayer's income tax liability. Similarly, the memorandum initialled by the principal parties in their individual and representative capacities was admissible as evidence of the joint venture agreement relevant in determining whether taxpayer and her trust had realized ordinary income on the sale of the San Bruno land because of participation in the joint venture.

The memorandum of April 23rd at bar is distinguishable from the statements in the cases apparently relied on by taxpayer and cited in Appendix C to her brief. Those cases did not involve an agreement which was a part of the details of the issue under the substantive law, nor was an author and party to the writing in court and available for examination with respect to the agreement and the writing. The latter reason also is sufficient to prevent the memorandum from being considered as hearsay. McCormick on Evidence (1954 ed.), pp. 457, 464. The cases of *Niederkrone v. Commissioner*, 266 F. 2d 238 (C.A. 9th), certiorari denied, 359 U.S. 945 and *Standard Oil Co. of California v. Moore*, 251 F. 2d 188 (C.A. 9th), certiorari denied, 356 U.S. 975, relied on by the taxpayer are further clearly distinguishable because of the absence in court of the author or party to the writing, necessitating the attempted reliance in those cases on the business records exception to the hearsay rule.

CONCLUSION

For the reasons stated above, the judgment of the District Court is erroneous, should be reversed, and judgment should be entered for the United States.

Respectfully submitted,

LOUIS F. OBERDORFER,
Assistant Attorney General.

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United States Attorney.

RICHARD L. CARICO,
Assistant United States Attorney.

December, 1961.

No. 17387

United States
Court of Appeals
for the Ninth Circuit

UNITED STATES OF AMERICA,

Appellant,

vs.

CHARLES E. AND LOIS ROSEBROOK,

Appellees.

Transcript of Record

Appeal from the United States District Court for the
Northern District of California,
Southern Division

FILED

JUL 20 1961



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

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LAURENCE E. DAYTON,
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In the United States District Court for the
Northern District of California,
Southern Division

Civil Action

No. 38765

CHARLES E. and LOIS ROSEBROOK, Husband
and Wife,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendant.

COMPLAINT

To the Honorable Judges of the Above Entitled Court:

Plaintiffs bring this action against the United States for the recovery of income taxes illegally and erroneously assessed and collected from plaintiffs and allege as follows:

I

Plaintiffs are citizens of the United States and residents of San Mateo County, California; jurisdiction is conferred upon this Court by 28 U.S.C. §1346(a)(1). The plaintiffs' claim does not exceed \$10,000.00 and arises under the Internal Revenue laws of the United States, as hereinafter more fully appears.

II

Plaintiffs' suit is brought for the recovery of \$303.72 of income taxes illegally and erroneously assessed to and collected from plaintiffs for the calendar year 1955, together with interest thereon from April 15, 1956, to

the date of payment, September 28, 1959, in the amount of \$59.37.

III

Plaintiffs duly filed their income tax return for the calendar year 1955 with the District Director of Internal Revenue, San Francisco, California, and paid the full amount of tax shown to be due upon the return on a date no later than April 15, 1956.

IV

Thereafter the Commissioner of Internal Revenue caused the aforesaid return of the plaintiffs for the year 1955 to be examined and as a result of said examination determined that plaintiffs had additional ordinary income of \$2,056.91 for the year 1955, but that plaintiffs overreported capital gains in the amount of \$1,-028.45 for a net increase in taxable income of \$1,-028.45. He determined that plaintiffs owed additional tax because of the aforesaid adjustment in the amount of \$303.72 and that they owed interest on the above deficiency in the amount of \$52.62 or a total income tax and interest in the amount of \$363.09.

V

In making the aforesaid adjustments to taxable income as reported on the returns of the plaintiffs, the Commissioner of Internal Revenue determined that amounts received by the taxpayers and reported as capital gains in the amount of \$1,028.45 was not gain on the sale of a capital asset, but represented ordinary income from the installment sale of an undivided interest in real property to customers in the ordinary course of

taxpayers' trade or business in the amount of \$2,056.91. The entire amount of the deficiencies resulted from the aforesaid adjustments by the Commissioner.

VI

Thereafter on or about September 28, 1959, pursuant to assessment and demand for payment, plaintiffs paid the sums of \$303.72 tax and \$59.37 interest to the Internal Revenue Service, sending them to the District Director of Internal Revenue for the district of San Francisco.

VII

Thereafter on or about September 29, 1959, claims for refund for the plaintiffs were filed with the District Director of Internal Revenue, setting forth the taxpayers' demand for refund of principal and interest paid pursuant to said assessment on the theory that the subject interest in land which was sold on an installment sale was not sold to customers in the ordinary course of taxpayers' trade or business, but was a capital asset and gain was properly reportable as capital gain, which claim is consistent with the facts upon which the returns were prepared and filed.

VIII

Said claim for refund was denied by the Commissioner of Internal Revenue by notice of disallowance sent by registered mail dated December 17, 1959.

IX

Plaintiffs did not hold the subject interest in land for sale to customers in the ordinary course of trade or business, but held it as capital asset and properly reported gain from said sale as capital gain.

X

The Commissioner erred in determining that the plaintiffs held such interest for sale in the ordinary course of their trade or business, and by reason of said error has erroneously and illegally assessed against and collected from the plaintiffs and paid into the Treasury of the defendant as income taxes and interest for the year 1955 the amount of \$363.09.

XI

Although repayment thereof has been demanded, no part of the above-mentioned sum has been credited, remitted, refunded or repaid to plaintiffs and the full amount thereof, together with interest thereon from September 28, 1959, at the rate of one-half per cent per month remains due and owing to the plaintiffs by the defendant.

Wherefore, plaintiffs demand judgment against the defendant in the amount of \$363.09 together with interest thereon from September 28, 1959, at the rate of one-half per cent per month together with costs and disbursements of this action.

/s/ EUGENE J. BRENNER,
/s/ MELVIN H. MORGAN,
/s/ HARRY L. FREEMAN.

[Endorsed]: Filed Dec. 18, 1959.

[Title of District Court and Cause.]

ANSWER

Now Comes the United States of America, the above-named defendant, by its attorney, Lynn J. Gillard, United States Attorney in and for the Northern District of California, and for its answer to the complaint filed herein alleges and says:

Admits the allegations in the first paragraph thereof, except it is denied that any income taxes have been illegally and erroneously assessed and collected from the plaintiffs.

1. Admits the allegations in paragraph I thereof.

2. Admits the allegations in paragraph II thereof, except it specifically is denied that any part of the amounts of \$303.72 and 59.37 was illegally and erroneously assessed to and collected from the plaintiffs or from either of them.

3. Admits the allegations in paragraph III thereof.

4. Admits the allegations in paragraph IV thereof.

5. Admits the allegations in paragraph V thereof.

6. Admits the allegations in paragraph VI thereof.

7. Admits the allegations in paragraph VII thereof.

8. Admits the allegations in paragraph VIII thereof.

9. Denies the allegations in paragraph IX thereof.

10. Denies the allegations in paragraph X thereof.

11. Denies the allegations in paragraph XI thereof, except it is admitted that no part of the sums of \$303.72 tax and \$59.39 interest, paid as alleged in paragraph VI of the complaint which is admitted in this answer, has been credited, remitted, refunded or repaid to the plaintiffs or to either of them.

Wherefore, defendant prays that the complaint filed

herein be dismissed, with costs to be assessed against the plaintiffs.

LYNN J. GILLARD,
United States Attorney,
/s/ THOMAS E. SMAIL, JR.,
Assistant United States Attorney.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed Feb. 11, 1960.

[Title of District Court and Cause.]

PARTIAL STIPULATION OF FACTS

It is hereby stipulated and agreed between the parties hereto, by their respective undersigned attorneys, that the following facts shall be taken as true and received as evidence in said case together with all exhibits attached hereto and made a part hereof; provided, however, that this stipulation does not waive the right of either party to introduce other evidence, not inconsistent with the facts herein stipulated, or to object to the introduction in evidence of the facts or documents herein stipulated on grounds of immateriality or irrelevance.

1. Plaintiff, Lois W. Rosebrook, on February 12, 1955, was married to plaintiff, Charles E. Rosebrook. Previously she was known as Lois Williams or Lois Williams Aull. Plaintiffs, Charles E. Rosebrook and Lois W. Rosebrook, filed a joint tax return for said year with the District Director of Internal Revenue in San Francisco, California. A photostatic copy of taxpayers' return is submitted herewith as a joint exhibit and marked "Exhibit 1-A." Plaintiff, Charles E. Rosebrook, had no interest in the land which is the subject of this proceeding.

2. Plaintiff, Lois W. Rosebrook, in 1955, was the adult daughter of George W. Williams and Hortense Williams.

3. In 1942 George W. and Hortense Williams established a trust for the benefit of their daughter, Lois W. Rosebrook, then a minor, with George W. Williams as sole trustee. The trust acquired assets, including a 1% undivided interest as tenant in common in 1159.6 acres of land in San Bruno, California, which was acquired in May of 1953. A true photostatic copy of the Declaration of Trust creating said trust is attached hereto as a joint exhibit and marked "Exhibit 2-B."

4. On December 18, 1953, the aforesaid trust created for her use and benefit was dissolved and plaintiff, Lois W. Rosebrook, by quitclaim deed, received the 1% interest in 1159.6 acres of real property in San Bruno, California.

5. On dissolution of said trust on December 18, 1953, Lois W. Rosebrook was then 27 years of age, and thereafter held said interest in 1159.6 acres of land previously held for her use and benefit by the above-mentioned trust. A true photostatic copy of said quitclaim deed is attached hereto and marked "Exhibit 3-C."

6. On dissolution of said trust, by three documents each entitled "Assignment" the personal property previously held for her use and benefit by the trust was distributed to Lois W. Rosebrook. True photostatic copies of said assignments are attached hereto and marked "Exhibit 4-D."

7. On dissolution of the trust, by a document entitled "Receipt and Assumption of Liability" plaintiff, Lois W. Rosebrook, accepted the trust property, includ-

ing the aforementioned interest in land. A true photostatic copy of said document is attached hereto and marked "Exhibit 5-E."

8. On or about February 10, 1954, all of the owners of the subject land, including plaintiff, Lois W. Rosebrook, entered into an agreement to convey 884.2 acres of the subject land to a corporation, Consolidated Lands, Inc. A true photostatic copy of said agreement is attached hereto and marked "Exhibit 6-F."

9. On February 10, 1954, the owners by statutory grant deed conveyed the above-mentioned 884.2 acres of said land to Consolidated Lands, Inc. and in payment thereof received a total of \$100,000 cash and an installment note for payment of the balance in the face amount of \$1,668,500 secured by deed of trust. A true photostatic copy of said grant deed is attached hereto and marked "Exhibit 7-G"; a true photostatic copy of said note is attached hereto and marked "Exhibit 8-H"; a true photostatic copy of said deed of trust is attached and marked "Exhibit 9-I."

10. Plaintiff, Lois W. Rosebrook, received \$1,000 in cash and a 1% interest in said note and deed of trust in payment of her interest in said 884.2 acres of land.

Dated: August 23rd, 1960.

/s/ EUGENE J. BRENNER,

/s/ HARRY L. FREEMAN,

Attorneys for Plaintiffs,

LAURENCE E. DAYTON,

United States Attorney,

/s/ By THOMAS E. SMAIL, JR.,

Assistant United States Attorney,

Attorneys for Defendant.

[Endorsed]: Filed Aug. 23, 1960.

[Title of District Court and Cause.]

MEMORANDUM AND OPINION

Plaintiffs, Charles E. and Lois W. Rosebrook,¹ citizens of the United States and residents of San Mateo County, California, bring this suit under 28 U.S.C. Section 1346(a)(1) for a refund of \$303.72 of federal income tax, which they claim was erroneously assessed and collected from them for the year 1955, together with interest assessed thereon in the sum of \$59.37 from April 15, 1956 to the date of payment, September 28, 1959, together with interest thereon at the rate of one-half of 1% monthly since the date of payment.

The question presented to the Court is whether gain on the installment sale of an interest in land is, in the circumstances of this case, capital gain on the sale of a capital asset within the meaning of Internal Revenue Code, 1954, 26 U.S.C. Sec. 1221, 1222, 1202, and regulations to Section 1221, Reg. Sec. 1.1221-1, and as reported by plaintiff taxpayer, or whether such gain, within the meaning of the law and the regulations, is ordinary income from a sale in the ordinary course of a business, as claimed by the Commissioner of Internal Revenue.

The Court finds that the facts are substantially as follows:

For some time prior to 1953, George W. Williams, plaintiff's father, had been attempting to purchase ap-

¹Plaintiff, Charles E. Rosebrook, is involved in this case solely by reason of having filed a joint tax return for the year 1955 with his wife, Lois W. Rosebrook.

proximately 1159.6 acres of San Francisco peninsula land owned by the San Bruno Land Company.

He was not able to obtain sufficient financing to make the purchase until 1953 when he interested a group, including himself, Frank Burrows, Andrew Conway, Martin Wunderlich and Thomas Culligan—all of whom were prominent in the real estate subdivision business.

On April 23, 1953, these parties entered into an agreement (Def. Ex. A) whereby they would purchase the stock of San Bruno Land Company, for a total of \$1,150,000, for the purpose of acquiring the 1159.6 acres of land and that after acquisition they would dissolve the corporation and take the land as tenants in common in proportion to their respective contributions.

On the same day they entered into another, separate memorandum (Def. Ex. B) to the effect that the respective tenants in common would hold the land for six months in order to realize a capital gain and then sell it to a development corporation to be formed by the parties for the purpose of developing and subdividing the land, the stock in any such corporation to be issued—one third to Williams and Burrows, one third to Conway & Culligan and one third to Wunderlich. (See Def. Ex. B).

It was understood that these respective parties were acting, not only for themselves, but for other interests represented by them.

Accordingly, on May 7, 1953, the group purchased the capital stock of the San Bruno Land Company. The corporation was immediately liquidated and the land was taken in the name of the group who then quit

claimed it to all contributing interests as tenants in common according to their respective contributions to the purchase price and took back a power of attorney for purposes of management.

Among the contributing interests represented in these transactions by George W. Williams was a certain irrevocable trust which he and his wife had created in 1942 for their daughter, Lois Rosebrook, who is the principal plaintiff in this case. Her father, George W. Williams, was sole trustee. In 1953 there was cash on hand in the trust in the amount of \$10,000. Williams, acting as trustee, contributed \$7,000 on behalf of the trust as part of the contribution of his group to the acquisition of the San Bruno land. In due course, the trust received a conveyance of a 1% interest therein as tenant in common.

On October 28, 1953, Williams, Burrows, Conway, Culligan and Wunderlich, and an outside party, organized Consolidated Land Company for the purpose of subdividing and developing the San Bruno land.

On December 18, 1953, when plaintiff was 28 years of age, the trust was dissolved and all the trust assets, including the 1% interest in the San Bruno land, were transferred by her father as trustee, into her name.

On February 10, 1954, the tenants in common of the 1159.6 acres, sold and conveyed 884.2 acres of the parcel to Consolidated Land Company for a total purchase price of \$1,768,500, payable in \$100,000 cash and an installment note of the corporation for the balance.

Plaintiff, concurring in the suggestion of her father, conveyed her 1% interest to the corporation and received the sum of \$1,000 in cash and a 1% interest in the installment note for the balance.

The Commissioner ruled that the gain on this sale was not a capital gain, but ordinary business income. This ruling was upon the theory, and the Government here contends, that plaintiff, Lois Rosebrook, in fact, held her 1% interest for the same purpose and with the same intent as all others participating in the venture and, further, that even if such was not her intent and purpose, the intent and purpose of her father, and others in the venture would be imputed to her as a matter of law by reason of her participation in it.

Assuming, and finding for the purpose of this case, that George W. Williams, plaintiff's father, trustee and agent, and others in the joint venture held their interests in this land primarily for sale to customers in the ordinary course of their business, it does not necessarily follow that this plaintiff held her 1% interest with the same intent and purpose.

The evidence in this case does not show that either plaintiff or her father, as trustee, agent or otherwise, intended that plaintiff, whose interest was represented by him in the transaction, would have any interest or activity in the proposed development company which was to be the corporate device through which the father and certain other members of the venture, were to develop the land in the ordinary course of their business.

On the contrary, the evidence shows that plaintiff was not to have, and did not ever acquire, any interest in, or take up any activity in, Consolidated Land Company, the development company which was eventually formed by plaintiff's father and other members of the venture for their business purposes.

Plaintiff, and some other represented parties, whose funds were invested in the land, were not to have any interest in Consolidated Land Company. (See, trans. p. 123).

All that plaintiff received for the sale of her 1% interest in the land was a \$1,000 down payment and the balance in accordance with an installment note executed by the corporation. (See, trans. pp. 57-58). She had no further concern with the development of the land for business purposes after the sale of her interest to Consolidated Land Company. She never became a stockholder, officer, director or employee of Consolidated Land Company. (Tr. pp. 40, 58). She knew of no commitments which her father had made for sale of the property to Consolidated Land Company and knew nothing about it. (Tr. p. 53).

Even if her father, as her trustee, invested her trust funds in the land because he knew that it was worth more than it cost, and that a large part of it would eventually be sold at a profit to a development company in the course of his business activities, this would be, as far as plaintiff's interest was concerned, nothing more than an investment in a capital asset with a view to eventual sale at a profit. Indeed, it would have been nothing more than an investment for all members of the venture if that were all there was to it. The situation of others in the venture is differentiated from plaintiff's situation by the fact that they held their interests with a view to eventual disposition through the medium of a development corporation to customers in the ordinary course of their business. The

evidence, however, shows that plaintiff was not in any such situation.

We are of the opinion, therefore, that plaintiff did not acquire or hold her interest in this property for sale in the course of any business of hers, no matter how the transaction may call for a different conclusion with respect to others.

Plaintiff's sale of her 1% interest in this 884 acre parcel of San Bruno lands was the first sale of real estate ever made by her and, with the exception of a subsequent sale in November, 1956, of her 1% interest in an additional 80 acres of the land to Consolidated Land Company for a shopping center, it has been her only sale of real estate.

Nor had the trust created for her by her parents, ever sold a parcel or any interest in real property, although it held, and plaintiff continues to hold, interests in two parcels of real estate.

Plaintiff is not, and never has been a dealer in real estate, has never held a real estate broker's license, is not a member of any partnerships dealing in real estate, has no background or pattern of real estate activity or employment.

She was graduated from Stanford University in 1946 with a Bachelor of Arts degree, major in English. From 1946-1953 she was a housewife, sometimes working as a medical receptionist. From 1953 to 1955 she worked at an auto rental firm, a rug cleaning firm, and briefly for her father as a secretary. Since February, 1955, she has been a housewife and has not been otherwise employed.

The intent and purpose of participants in a joint venture, which contemplates a sale of their respective realty interests to an ultimate purchaser, as in this case the development company, might be quite different one from another. For some it may be just a step in carrying on their business; for others it may be merely a single opportune investment with a view of ultimate profit but unrelated to any business of the participant, as in the case of plaintiff here. In the absence of a true business partnership for the purpose of the transaction, which the Court finds did not exist here, the intent and purposes of the former category are not imputed to the latter category, nor does the situation of the former for tax purposes necessarily determine the situation of the latter.

Even if we assume that the acts of plaintiff's father, as trustee, in making the original investment of trust funds are binding on the beneficiary (See: *Werner v. United States*, 188 F. 2d 26 (9th Cir. 1951)), such rule would not be determinative of this case because of our finding that the father did not in fact commit plaintiff or the trust, to the business purposes existing between himself and certain of the other participants.

We have examined *Bistline v. United States*, 260 F. 2d 77 (9th Cir. 1958), where the trial court's finding that frequent and continuous real estate sales made by a daughter after a purported gift of the properties from her father, a real estate dealer, for tax avoidance purposes, were in fact made by the daughter in the course of a real estate business in joint enterprise with her father.

The case is clearly distinguishable from the instant case on the facts and in the inferences to be reasonably drawn.

Further, as stated by the Court in *Bistline* at 801 quoting from *Stockton Harbor Industrial Co. v. Commissioner*, 216 F. 2d 638, 650 (9th Cir. 1954), "What is and what is not trade or business, and when property is or is not held for sale to customers are questions of fact," and, further, "This Court has never set up formulas of fact as rules of law."

Although the determination of the Commissioner is presumed to be correct, we believe that there is no evidence in this case to support a finding that the plaintiff held her 1% interest in this realty primarily for sale in the course of her business and, further, that the evidence negatives any such inference.

Judgment is, therefore, awarded to plaintiffs with directions that they prepare findings of fact and conclusions of law, in accordance with this Opinion, as provided by Rule 21 of this Court.

Dated: October 19th, 1960.

/s W. T. SWEIGERT,

United States District Judge.

[Endorsed]: Filed Oct. 19, 1960.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause came on regularly for trial on August 23 and 24, 1960, before the Court without a jury, the Honorable William T. Sweigert, Judge, presiding. The plaintiff, Lois W. Rosebrook, appeared in person and by her attorneys, Eugene J. Brenner and Harry L. Freeman of Janin & Morgan, and the plaintiff, Charles Rosebrook, appeared only by said attorneys. The defendant appeared by its attorneys, Laurence E. Dayton, United States Attorney for the Northern District of California, and Richard L. Carico and Thomas E. Smail, Jr., Assistant United States Attorneys for said District. Oral and documentary evidence was introduced by and on behalf of the respective parties, arguments were made by their attorneys, and the cause submitted at the conclusion of trial.

The Court, being fully advised in the premises, made and entered its Memorandum and Opinion on October 19, 1960, granting judgment for the plaintiffs and directing preparation of the following:

Findings of Fact

1. This is a suit for refund of 1955 federal income taxes of \$303.72 and interest of \$59.37 assessed against the plaintiffs and paid by them to the District Director of Internal Revenue at San Francisco, California, on September 28, 1959. A claim for refund of the assessed taxes and interest, together with interest as provided by law, was filed by the plaintiffs on September 28, 1959. A claim for refund of the assessed taxes

and interest, together with interest as provided by law, was filed by the plaintiffs on September 29, 1959, and was denied in full by the Commissioner of Internal Revenue by registered letter dated December 17, 1959. This suit was commenced on December 18, 1959.

2. The plaintiff, Lois W. Rosebrook, is the adult daughter of George W. Williams and Hortense Williams. She married the plaintiff, Charles E. Rosebrook, on February 12, 1955, and filed a joint federal income tax return with him for the calendar year 1955. (Hereinafter the word "plaintiff" refers only to Lois W. Rosebrook.)

3. In 1942 when plaintiff was a minor, her parents, George W. and Hortense Williams, as grantors, established an irrevocable trust with George W. Williams as sole trustee and conveyed into the trust cash and other assets. The trust instrument gave the trustee broad powers relating to trust investments, but he did not exercise them except to the extent herein found.

4. Plaintiff was graduated from Stanford University in 1946 with a Bachelor of Arts degree, major in English. From 1946 to 1953 she was a housewife, sometimes working as a medical receptionist. From 1953 to 1955 she worked in an auto rental firm, a rug cleaning firm, and briefly for her father as a secretary. Since February 12, 1955, she has been a housewife and has not been otherwise employed.

5. The plaintiff has never held a real estate broker's or salesman's license, has never entered into any written or oral partnership agreement or signed a partnership tax return in connection with venture hereinafter considered, and has no background or pattern of activity in the real estate business.

6. Some time prior to 1953, George W. Williams had acquired an option on 1159.6 acres of land on the San Francisco Peninsula near San Bruno, California, which was owned by the San Bruno Lands, Incorporated, and was attempting to purchase said land.

7. George W. Williams was having difficulty obtaining sufficient financing to make the purchase until May, 1953, when he interested a group of people, including himself, Frank Burrows, Andrew J. Conway, Martin Wunderlich, and Thomas J. Culligan in joining with him. It was understood that the above respective parties were acting not only for themselves, but for other interest represented by them.

8. On April 23, 1953, the above parties entered into an agreement whereby they agreed to purchase the stock of San Bruno Lands, Incorporated for a total of \$1,150,000.00 for the purpose of acquiring the 1159.6 acres of land, and that after the acquisition they would dissolve the corporation and take the land as tenants in common in proportion to their respective contributions.

9. On May 7, 1953, the above five parties plus others, including George W. Williams, as trustee for the trust of Lois W. Rosebrook, entered into an agreement with Williams, Conway and Wunderlich reciting that said three men would acquire said 1159.6 acres for the benefit of all the individuals and would immediately convey the property to them in stated percentage interests, the interest of the trust for plaintiff to be 1%.

10. On May 7, 1953, George W. Williams, Andrew J. Conway and Martin Wunderlich, purchased the capital stock of San Bruno Lands, Incorporated. These three individuals acted pursuant to an agreement between themselves and the shareholders of San Bruno

Lands, Incorporated. The shareholders of San Bruno Lands, Incorporated were reluctant to deal with more than three people, but it was understood that Andrew J. Conway, Martin Wunderlich and George W. Williams were acting not only for themselves, but for other members of the group.

11. The corporation was liquidated immediately thereafter and the land was taken in the name of Williams, Conway and Wunderlich, who on June 8, 1953, quitclaimed it to the tenants in common according to their respective contributions to the purchase price. Williams, Conway and Wunderlich took back a power of attorney from all members of the group, dated June 8, 1953, for purposes of facilitating such things as the execution of leases.

12. Among the contributing parties represented in these transactions by George W. Williams was the irrevocable trust created in 1942 for the benefit of plaintiff. In May, 1953, there was cash on hand in the trust assets in excess of \$10,000.00. Williams, acting as trustee, paid \$7,000.00 cash on behalf of the trust as its part of the contribution of his group to the acquisition of the San Bruno land. In due course, the trust received a conveyance of a 1% interest therein as tenant in common.

13. On October 28, 1953, Williams, Burrows, Conway, Culligan, and Wunderlich, and an outside party, Boettcher & Company organized Consolidated Lands, Incorporated for the purpose, among others, of subdividing and developing the San Bruno land. Boettcher & Company held a 22% interest therein.

14. On December 18, 1953, when plaintiff was twenty-eight years of age, the irrevocable trust for her

benefit was dissolved and all the trust assets, including the 1% interest in San Bruno Lands, were transferred by George W. Williams as Trustee to the plaintiff, Lois W. Rosebrook, in her own name. She executed a document entitled "Receipt and Release" accepting the conveyance to her of said property.

15. The trust for the benefit of plaintiff had never sold a parcel or interest in real property although it held, and plaintiff continues to hold, interests in two other parcels of real estate as investments.

16. Said trust property was conveyed to plaintiff without any oral or written conditions attached thereto. No power of attorney relating to said property with plaintiff as grantor and George W. Williams as grantee, was given or has ever existed in regard to this property.

17. Both before and after the trust for the plaintiff was terminated, rents from the property were collected and paid into a common bank account and expenses relating to the property, except property taxes and interest, were paid from said account. Periodic accountings were prepared for the tenants in common by an employee of the G. W. Williams Company, a corporation in which plaintiff's father was interested. Plaintiff acquiesced in this arrangement. Property taxes and interest were paid individually by each tenant in common, including plaintiff, in proportion to his or her interest in the property.

18. On February 10, 1954, the tenants in common of the 1159.6 acres sold and conveyed 884.2 acres of the parcel to Consolidated Lands, Incorporated for a total purchase price of \$1,768,500.00 payable \$100,000.00 in cash and an installment note of the corporation for the balance.

19. Plaintiff, acting substantially on the business advice of her father, conveyed her 1% interest to the corporation and received the sum of \$1,000.00 cash at that time, and a 1% interest in the installment note for the balance.

20. Plaintiff's sale of her 1% interest in the 884.2 acre parcel of San Bruno Lands was the first sale of real estate ever made by her and, with the exception of a subsequent sale in August, 1956, of her 1% interest in an additional 80 acres of the land to Consolidated Lands, Incorporated for a shopping center, it has been her only sale of real estate.

21. Neither plaintiff, nor the trust for her benefit, ever became a stockholder, officer, director, or employee of Consolidated Lands, Incorporated. Plaintiff knew of no commitments for the sale of the property to Consolidated Lands, Incorporated and had no further concern with the development of the land for business purposes after the sale of her interest to Consolidated Lands, Incorporated.

22. Whatever business purpose he might have had acting in his individual capacity, George W. Williams, as trustee, did not commit the trust for the benefit of the plaintiff, or the plaintiff, to a purpose of holding property for sale to customers in the ordinary course of a trade or business.

23. The plaintiff reported her share of the profit from this sale on the installment basis, and for the year 1955 reported \$2,056.91 as a long-term capital gain. This long-term capital gain treatment was subsequently challenged by the Commissioner of Internal Revenue upon audit of her return, and additional tax and interest was assessed as set forth in Finding No. 1.

Immediately after payment, the plaintiffs filed a claim for refund, alleging that Lois W. Rosebrook's interest in the property sold to Consolidated Land Company, Inc. was a capital asset; and said claim was thereafter denied in full, as aforesaid.

Conclusions of Law

1. This Court has jurisdiction of this action and the parties to it.

2. No true business partnership existed among the plaintiff and the other holders of undivided interests to the land in question.

3. Plaintiff was not a dealer in real property.

4. Plaintiff did not hold her interest in the 884.2 acres of land in San Bruno, California, primarily for sale to customers in the ordinary course of a trade or business.

5. The interest in land sold by the plaintiff was a capital asset in her hands as defined by §1221 of the Internal Revenue Code, 26 U.S.C. 1221.

6. Plaintiff properly reported gain on the subject sale of an interest in land as capital gain.

Judgment will be entered for plaintiff in the amount prayed for.

Dated: Jan. 3, 1961.

/s/ W. T. SWEIGERT,

Judge of the United States District
Court for the Northern District of
California, Southern Division.

Approved as to Form:

/s/ RICHARD L. CARICO,

Assistant United States Attorney.

[Endorsed]: Filed Jan. 3, 1961.

In the United States District Court
for the Northern District of California
Southern Division

Civil Action

No. 38765

CHARLES E. ROSEBROOK and LOIS W. ROSE-
BROOK,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendant.

JUDGMENT FOR PLAINTIFFS ON
FINDINGS OF COURT

The issues in the above-entitled action having been duly and regularly brought on for trial before the Court sitting without a jury, the parties having appeared by their respective counsel, the evidence adduced by the parties having been heard, and the issues having been duly tried, the Court filed its Memorandum and Opinion on the 19th day of October, 1960, and its Findings of Fact and Conclusions of Law on the 3rd day of January, 1961, directing judgment as hereinafter provided, it is now

Ordered, Adjudged and Decreed that the plaintiffs, Charles E. Rosebrook and Lois W. Rosebrook, recover of the defendant, United States of America, the sum of \$363.09 (with interest thereon at the rate of 6%

per annum from the 28th day of September, 1959)
plus their costs in this action.

/s/ W. T. SWEIGERT,
United States District Judge.

Approved as to Form:

/s/ RICHARD L. CARICO
Asst. United States Attorney.

[Endorsed]: Filed Jan. 3, 1961.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that the United States of America, the defendant above-named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on January 3, 1961.

Dated: March 2, 1961.

LAURENCE E. DAYTON
United States Attorney.

/s/ RICHARD L. CARICO,
Asst. United States Attorney.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed March 2, 1961.

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS
OF RECORD ON APPEAL

To the Clerk of the above-entitled Court:

The appellant, United States of America, designates the following portions of the record, proceedings, and evidence to be contained in the record on appeal in this action: the complete record and all the proceedings and evidence.

Dated: March 2, 1961.

LAURENCE E. DAYTON,
United States Attorney.

/s/ RICHARD L. CARICO,
Asst. United States Attorney.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed March 2, 1961.

[Title of District Court and Cause.]

ORDER EXTENDING TIME

This matter having been presented to the Court on the ex parte application of the defendant, United States of America, in accordance with Rule 73(g) of the Federal Rules of Civil Procedure, and good cause having been shown therefor:

It is ordered that the time within which the defendant, United States of America, must file the record on

appeal and the time for docketing the appeal is extended from April 11, 1961 to May 31, 1961.

Dated: April 7, 1961.

/s/ W. T. SWEIGERT,

United States District Judge.

[Endorsed]: Filed April 7, 1961.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO RECORD ON
APPEAL

I, James P. Welsh, Clerk of the United States District Court for the Northern District of California, hereby certify the foregoing and accompanying documents and exhibits listed below, are the originals filed in this court in the above entitled case and constitute the record on appeal herein as designated by counsel for the Appellant:

Complaint.

Summons, executed.

Answer.

Notice & Motion for trial date (without jury).

Notice of motion for continuance.

Subp. executed as to Gerhard Mohr.

6 subp. executed as to T. J. Culligan, Jr., Frank Ferguson Burrows, Andrew Conway, Joseph W. Mell, Jr., Norman Sullivan, and Martin Wunderlich.

Defendant's trial memorandum.

Plaintiff's trial brief.

Partial stipulation of facts.

Memo of Plaintiff on nonadmissibility of exhibit.

Subp. executed as to George Williams.

Reporter's Transcript, proceedings of trial.

Memorandum and opinion.

Defendant's objections and proposed modifications,
findings & conclusions.

Findings of fact and conclusions of law.

Judgment for Plaintiff on findings of Court.

Notice of entry of Judgment.

Memo cost bill, taxes at \$63.00.

Notice & Motion to review taxation of costs, by De-
fendant.

Order disallowing certain items taxed by the Clerk.

Notice of appeal.

Designation of contents of record on appeal.

Order extending time to file record and docketing the
appeal.

Plaintiff's exhibits No. and No. 2.

Defendant's exhibits A to G inclusive.

In Witness Whereof, I have hereunto set my hand
and affixed the seal of said District Court of this 26th
day of May, 1961.

[Seal]

JAMES P. WELSH,
Clerk.

/s/ By HARRY R. OLIVER,
Deputy.

In the United States District Court
Northern District of California
Southern Division

Before: Honorable William T. Sweigert, Judge.

No. 38,765

CHARLES ROSEBROOK and LOIS W. ROSE-
BROOK,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendants.

Appearances: For the Plaintiff: Eugene J. Bren-
ner, Esq., Harry L. Freeman, Esq. For the Defend-
ant: Laurence E. Dayton, Esq., United States Attor-
ney, By: Richard Carico, Esq., Asst. United States
Attorney, Thomas Smail, Esq., Asst. United States At-
torney.

PROCEEDINGS OF TRIAL

August 24, 25, 1960 [1]*

* * * * *

LOIS W. ROSEBROOK,

a plaintiff herein, called as a witness in her own be-
half, being first duly sworn, testified as follows:

The Clerk: Please state your name and occupation
for the Court.

The Witness: Lois W. Rosebrook, housewife.

*Page numbers appearing at top of page of Original
Transcript of Record.

(Testimony of Lois W. Rosebrook.)

Direct Examination

By Mr. Brenner :

Q. What is your address, Mrs. Rosebrook?

A. 1228 Kenilworth Road, Hillsborough.

Q. What was your address in 1955?

A. 515 North El Camino, San Mateo.

Q. What was your occupation in 1955?

A. Well, I was married in February 1955. Before then I had been a secretary.

Q. Would you trace briefly for us your formal educational [37] background?

A. I graduated from Burlingame High School in 1942 and Stanford University in 1946.

Q. What was your major at Stanford University?

A. English major.

Q. Did you take any real estate classes at Stanford? A. No.

Q. Have you ever taken any real estate classes anywhere? A. No, I have not.

Q. Would you trace for us briefly your occupational or working background, naming the employers and so forth? A. Well, to go back—

The Court: Just briefly; just to give us some idea of your business background.

The Witness: I was a medical receptionist, and I worked for Hertz Rent a Car, and Girl Friday for G & G Rug Company, private secretary.

Mr. Brenner: Q. Are you married?

A. Yes, I am.

Q. What is your husband's name?

A. Charles Ernest Rosebrook.

(Testimony of Lois W. Rosebrook.)

Q. What was his occupation in 1955?

A. He was a floor manager for KGO-TV.

Q. Did Mr. Rosebrook have an interest in the real property which forms the subject of this suit? [38]

A. He knew nothing about it at that time.

Q. Mrs. Rosebrook, did you file a joint tax return with Mr. Rosebrook for the year 1955?

A. Yes.

Mr. Brenner: May I have Exhibit 1-A, please?

Q. Mrs. Rosebrook, I show you Exhibit 1-A to the stipulation of facts which we have submitted here today. This is a photostatic copy. I will ask you if this is your signature on page 1 of the tax return, which is Form 1040. A. Yes, it is.

Q. What were your duties when you were a secretary, Mrs. Rosebrook?

A. Answering the telephone, making appointments with and for my employer, and taking his dictation and doing typing, and so on.

Q. Who was your employer?

A. My father, Mr. Williams.

Q. Was it your father or a business owned by him?

A. Well, technically I guess you would say a business owned by him, but he was my immediate superior.

Q. What is the name of the employer, the business?

A. The G. W. Williams Company.

Q. Is that a corporation?

A. Yes, it is.

Q. How long did you work in that capacity? [39]

A. I would say about three or four months.

Q. Did your duties as an employee of the G. W.

(Testimony of Lois W. Rosebrook.)

Williams Company ever require you to familiarize yourself with the economics of buying and selling real estate? A. No, they did not.

Q. Were you ever consulted on problems concerning the buying and selling of real estate?

A. No.

Q. Had you been to business school before you became a secretary? A. No, I had not.

Q. In 1953 and 1954 or 1955 were you an officer or director of any corporation?

A. No, I was not.

Q. Specifically, you were not an officer in the San Bruno Lands or Consolidated Lands?

A. No, I was not.

Q. Have you ever been an officer or director of San Bruno Lands or Consolidated Lands?

A. Of neither one.

Q. In 1953 or 1954 or 1955 did you acquire or own any interest in real property?

A. When the trust was dissolved in December 1953, I acquired some.

Q. What interest in real property did you acquire at that time? [40]

A. It was the one percent interest we are talking about here in the San Bruno Land, and two buildings, the Ford and Buick Buildings in San Bruno.

Q. I didn't hear that last remark.

A. The Ford and Buick Buildings in San Bruno.

Q. You had an interest in those buildings?

A. That's right.

Q. Do you know what interest you had?

A. I think it is around a third.

(Testimony of Lois W. Rosebrook.)

Q. Do you know how your interest is held in those two buildings? A. In my own name.

Q. Do you still have those two buildings?

A. Yes, I have.

Q. That is, your interest in those two buildings.

A. That's right.

Q. Who established the trust for your benefit?

A. My mother and father did.

Q. Do you know when? A. 1942.

Q. How old were you at that time?

A. I think I figured out I was around 18.

Q. Who was the trustee of the trust?

A. My father was.

Q. And what is his name?

A. George W. Williams. [41]

Q. Did you know what the trust property was at that time? A. No, I did not.

Q. Do you know when the trust was dissolved?

A. Yes, December 18, 1953.

Q. Mrs. Rosebrook, where were you in May and June of 1953?

A. 1953? Somewhere around Jerusalem or Cairo or Istanbul.

Q. You were traveling?

A. That's right.

Q. Do you remember the facts and circumstances surrounding the dissolution of the trust?

A. Well, mainly that it was dissolved and I was handed certain papers listing the assets of the trust.

Q. Was there an attempt made to familiarize you at that time with the trust property?

A. Oh, yes.

(Testimony of Lois W. Rosebrook.)

Q. I show you a document entitled Quitclaim Deed dated December 18, 1953, which is Exhibit C-3 to the stipulation which was filed here today, and ask you if you have ever seen that. A. Yes, I have.

Q. Do you remember the circumstances, briefly, in your own words?

A. As I recall, I think my father got us all together to dissolve the trust. It was probably in the study of my folks' home, and we were handed out the papers and I signed the [42] Assumption of Liability and signed the receipt.

Q. I show you now three sheets of paper entitled 4-D, or marked 4-D, which are exhibits to the stipulation which was submitted here today, and ask you if you recognize that.

A. Yes, bonds and stock shares, yes.

Q. Briefly, were these the documents by which certain properties were transferred to you out of the trust?

A. That's right, plus the straight bonds themselves.

Q. You received the bonds themselves?

A. Yes. I got to clip the coupons.

Q. Mrs. Rosebrook, I show you now a document entitled Receipt and Assumption of Liability and it's marked 5-E to the stipulation here today, and I will ask you if you recognize that document. A. Yes.

Q. Would you describe what it is?

A. Well, it assigned various shares in companies. They were stock shares. And the deeds, and that I had received these things, that I signed them, and some notes.

Q. Did you sign the original of this document?

A. Yes.

(Testimony of Lois W. Rosebrook.)

Q. Now, Mrs. Rosebrook, was there an attempt made to familiarize yourself with the whole property picture of the trust at the time of its dissolution?

A. I tried to become more familiar with it as time went on, yes. [43]

Q. What did your father tell you at the time of distributing the property out of the trust to you?

A. He said now that he distributed it, it was time that we learned how to handle our own property.

Q. And how did you keep familiar with the property which you now held in your own right?

A. Well, as far as the Ford and Buick Buildings went, we received accountings.

Q. And how about so far as this one percent interest was concerned?

A. Oh, yes, there were accountings there and our portions of taxes that had to be paid and debts that came in.

Mr. Brenner: At this time, Your Honor, I would like to have marked for identification Plaintiff's Exhibit 2.

(Document entitled Accounting was marked Plaintiff's Exhibit 2 for identification.)

Mr. Carico: Your Honor, we would like to have a copy of this document.

The Court: What is it?

Mr. Carico: We would like to have a copy of that document.

The Court: A copy?

Mr. Carico: A copy, yes.

The Court: If counsel has a copy, he will give you

(Testimony of Lois W. Rosebrook.)

a copy. Otherwise, you will have an opportunity to examine it. [44]

Mr. Brenner: Q. Mrs. Rosebrook, I show you a document marked Plaintiff's Exhibit 2 for identification and entitled "Accounting," and ask you if you would identify that document and tell us a little about it.

The Court: You can lead her, if you know what it is. Let's move along.

Mr. Brenner: Q. Mrs. Rosebrook, you said that you were kept familiar with the affairs of the land in which you held a one percent interest?

A. That's true.

Q. Is this a copy of the document by which you were kept informed?

A. Yes, it tells where the money goes and how much was owed the bank.

Mr. Brenner: At this time, Your Honor, I would like to submit this into evidence.

The Court: Any objection? Let's have the record clear. Did you offer something in evidence?

Mr. Brenner: Yes, Plaintiff's Exhibit 2.

The Clerk: I have it right here, Your Honor.

The Court: Any objection?

Mr. Carico: No objection.

(Whereupon Plaintiff's Exhibit 2 for identification was received in evidence.)

Mr. Brenner: Q. Mrs. Rosebrook, did you receive any [45] income from this property over a period of time? A. Yes, I did.

(Testimony of Lois W. Rosebrook.)

Q. What was the nature of that income, do you know?

A. It was some money from the land that the Navy was renting and flower leases.

Q. Did you ever pay any expenses in regard to the property?

A. Yes, there were various expenses that came up.

Q. Can you give us an example of some of the expenses you were called on to pay?

A. I think—well, one that comes to mind is probably the fact we would have to burn the weeds off so it would not be a fire hazard to the rest of the area.

Q. Do you know how taxes were handled in regard to this property?

A. As I recall, we would receive a notice of our share, or each one would receive a notice of his share of taxes. Mr. Crane sent them out, I believe, and we would send in our individual checks for the amount we owed.

Q. What would you do then?

A. Send the checks to Mr. Crane for the amount that we owed.

Q. For your proportionate share of the taxes?

A. That's right.

Q. Do you know what Mr. Crane would do with the checks?

A. I certainly hope he gave them to the tax people.
[46]

Mr. Carico: Objection. No showing that she knows what Mr. Crane did with the checks or even who Mr. Crane is.

The Court: Overruled.

(Testimony of Lois W. Rosebrook.)

Mr. Brenner: Q. When you received your interest in the property, were any oral conditions stated to you upon receipt of the property, any oral conditions upon giving the deed to you?

A. No, there were not.

Q. Did you sign any written conditions or acceptance to any written conditions in relation to the distribution of the property to you? A. No.

Q. Was there any understanding between you and anyone else as to how you would hold this property or what any use or disposition of it would be?

A. No.

Q. Mrs. Rosebrook, have you ever been asked to sign a partnership tax return?

A. No.

Q. In your opinion, are you a member of any partnerships?

Mr. Carico: Objection, Your Honor.

The Court: Sustained.

Mr. Brenner: Q. Can you describe your interest in these 1,159 acres of land further?

A. Well, as it was explained to me when the trust was [47] dissolved, I owned my share. It was an undivided share and I was a tenant in common, and I owned mine in my own right, and if there was any discussion on it, I could say, no, I didn't like to do this. In other words, I could voice my opinion and it would be heard.

Q. Did you sign any partnership agreement in relation to the property?

A. I have never signed any partnership agreement.

(Testimony of Lois W. Rosebrook.)

Q. Did you enter into any agreement or understanding that the majority would control in regard to any use and disposition of this property?

A. No.

Q. Have you ever objected to any use or disposition of this property?

A. At one time a memo came around saying there were a certain amount of top soils to be sold, and my husband and I had just been buying it and we had paid a great price for this and it seemed that this top soil was going at a very low price, and I wrote a note suggesting they certainly try to do better on the price, and, as it turned out, we did.

Q. Would you elaborate on that, "as it turned out, you did"? What happened? How did you voice your objection?

A. I wrote it down, and as it turned out, the original sale did not go through and I think a higher price was finally acquired. [48]

Q. Mrs. Rosebrook, do you know how much of the land was conveyed to Consolidated Lands on February 10, 1954?

A. Around 884 acres.

Q. Was this the first sale of an interest in land you had ever made?

A. Except for the property settlement in the divorce case, yes.

Q. Do you know how the gain on the sale of your interest was recorded?

A. Long term capital gains. It was an installment sale.

(Testimony of Lois W. Rosebrook.)

Q. Did you go through some sort of mental process in considering whether or not you should sell your interest in the land?

Mr. Carico: Objection, Your Honor.

The Court: That question doesn't mean anything. "Mental process"? I wouldn't know what she meant if she did say "yes."

Mr. Brenner: Q. How did, Mrs. Rosebrook, the opportunity to sell the interest in the land come to your attention?

A. My father told me about it and mentioned that the price was an excellent one; in other words, we were practically doubling the initial investment that had been made. And at that time I could certainly use the money.

Q. Would you expand upon that, that you could certainly use the money? [49]

A. Well, at that time, in February of 1954, I was living in an apartment by myself with my small daughter and about getting ready to go to look for work, and there was no alimony so money was very handy.

The Court: How much, so far as you were concerned, would it mean in income to you?

The Witness: It would mean right at that point about a thousand dollars.

The Court: And further payments—

The Witness: To come in.

The Court: And did you ever see the agreements which your father had entered into either with the San Bruno Land Company or with the —well, with any of the associates in this matter, the other owners in common?

(Testimony of Lois W. Rosebrook.)

The Witness: The only thing was when I finally signed the paper to sell my one percent interest in the land.

The Court: Up to that time had you seen any agreements between your father and Mr. Conway and these other people who had an interest in the property?

The Witness: No.

The Court: Had your father or anyone else ever explained those agreements to you, told you what they contemplated or provided?

The Witness: No. The property was given to me and I knew of nothing in the near future that was going to be done. [50]

The Court: Up to that time, had you known anything about the property or what your father had done when he acquired it?

The Witness: I knew none of the details.

The Court: It was only at the time you made the sale that your father explained to you it was an advantageous sale?

The Witness: Well, he had explained beforehand that perhaps a chance would come up, and that the price was very good, and at that point I agreed it was a good idea.

The Court: Now, the lady says, as I understand it, at the time that she sold the property she hadn't seen any agreement of her father's entered into with any of the other owners of the property and he hadn't explained those agreements to her.

As I understand, the only discussions with your father giving any information regarding your interest

(Testimony of Lois W. Rosebrook.)

in this property was what, prior to the time you actually sold it?

The Witness: Was when the trust was dissolved and it was explained I was holding this one percent in my own right, and I was a tenant in common, and that—I guess you call it that I had a veto power, and I could object to anything that was going on.

The Court: All right, was anything said about any commitments your father had made to sell the property to any particular person or any particular company?
[51]

The Witness: No, sir.

The Court: All right, go ahead.

Mr. Brenner: Q. Did you personally consider this an advantageous sale?

A. When you can double your money, it is usually a pretty good sale.

Q. But this was a personal judgment on your part?

A. Definitely.

Q. Mrs. Rosebrook, was there any particular means adopted to inform you of your property holdings upon dissolution of the trust?

A. You mean aside from the accountings that came through?

Q. No, at the time of the dissolution of the trust, was there any particular means adopted to attempt to start to familiarize you with the property holdings which you now had?

A. Oh. Well, my father—

The Court: She told me she had no conversation with her father or anybody else about this property up

(Testimony of Lois W. Rosebrook.)

to the time it had been put into her hands and she was about to sell it. Is that right?

The Witness: That's true up to a point. When my father dissolved the trust and we got all these things, and then I had suggested it would be nice to have—well, it would be nice to know more about it, but up until a short time before the actual sale was arranged, that was when it was first talked [52] of, but not all along. For three or four months before the sale was made.

The Court: But did your father ever tell you that the property was committed by certain agreements that he had made to be sold to or intended to be sold to the Consolidated Land Company?

The Witness: I knew of no commitments that he had and I didn't know anything about the Consolidated Lands.

The Court: All right.

Mr. Brenner: Q. Upon or immediately after dissolution of it, did you attend any meetings to familiarize yourself with the property?

A. Yes, we had meetings in my father's study at home.

Q. Would you describe them more in detail?

A. Well, we would ask him questions about the various properties and he would try to answer our questions.

Q. At whose suggestion were these meetings held?

A. I expect it was mine. I asked about it at the time the trust was dissolved.

Q. Have you ever made any other sales or conveyances of land or interests in land?

(Testimony of Lois W. Rosebrook.)

A. Well, the Navy condemned the 53 acres, so I guess that is a conveyance. And there was the sale to Consolidated of 80 acres for the shopping center.

Q. Do you know when the Navy condemnation was? [53]

A. I think it was November of 1956.

Q. Do you know when the sale of the 80 acres took place?

A. That was sometime in August or September.

Q. Of what year?

A. 1956.

Q. Did you join in that sale? A. Yes.

Q. How did you report that sale for tax purposes?

Mr. Carico: Objection. That is completely outside the scope of the issues in this case.

The Court: I don't see that is is very helpful.

Mr. Brenner: Your Honor, if I may explain the purpose of the question—

The Court: Go into it, if you want to, if it will save time. Go ahead.

Mr. Brenner: One of the tests in this type of case is frequency of transactions, and what I wish to establish is that she only made two sales and that on one of them she reported it as capital gains treatment, which has never been challenged, although her returns were audited.

The Court: All right, go ahead.

Mr. Brenner: Q. Do you know how you reported that sale for tax purposes?

A. Long term capital gains.

The Court: What parcel are you talking about?
[54]

(Testimony of Lois W. Rosebrook.)

Mr. Brenner: This is the 80-acre parcel, Your Honor, sold in August of 1956, or thereabouts.

Q. Was your return for 1956 audited, Mrs. Rosebrook?

A. Yes, I believe it was.

Q. Do you know if the reporting as capital gains of this 80 acres has been challenged?

A. No, it has not.

Mr. Carico: Objection. This is going into something that took place long past—(inaudible to the reporter).

The Court: Go ahead.

Mr. Brenner: Q. You may answer.

The Court: The question was, Was it ever challenged, that is, the reporting of it as a capital gain?

The Witness: No.

The Court: So far as you know?

The Witness: Not so far as I know.

Mr. Brenner: Q. Mrs. Rosebrook, were you in a position to know what would happen if anyone objected to an intended use or disposition of that parcel of this property?

Mr. Carico: Your Honor, this seems to call for—

The Court: Reframe it. Be as specific as you want.

Mr. Brenner: Q. Based upon what you had observed, do you know what would happen if any single person objected to a purported use or disposition of this property?

Mr. Carico: Objection, Your Honor. [55]

The Court: I don't understand the question. Ask

(Testimony of Lois W. Rosebrook.)

her what you want to know and go right ahead. Come to the point.

Mr. Brenner: The purpose of the question, Your Honor, is to show that any one person could have prevented any use of the property which is an attribute of tenancy in common but not of a joint venture or partnership.

The Court: Well, establish what the facts were and we will determine that. Any conversations—

Mr. Brenner: Q. Mrs. Rosebrook, of your knowledge did anyone at any time object to any proposed use or disposition of the property?

A. Well, I know that I myself did once object on the top soil.

The Court: She has already gone into that.

Mr. Brenner: Q. Have you made acquisitions of interests in property or parcels of property other than the two which we have mentioned here today?

A. Yes.

Q. Briefly, would you describe them?

A. One is our home on Kenilworth Road in Hillsborough, and the other is an oak-studded lot on Black Mountain which would make a beautiful place for a home, and then there is stock,

Q. Have you sold any of those interests in property? [56]

A. Not in the property, no.

Q. Do you make other investments besides in real property?

A. I have been trying to buy a duplex or triplex as investment property, but so far found nothing that has worked out.

(Testimony of Lois W. Rosebrook.)

Q. How about property other than real property?

A. Such as stocks?

Q. Yes.

A. Yes, I made stock purchases.

Q. Can you name some of the stock purchases you have made?

A. We bought Barium, and sold it too soon, I'm afraid, and we have stock in Watson Bros. Trucking Company and Tennessee Gas & Transmission.

Q. When you sold your interest in the 884 acres, how much did you sell it for?

The Court: You mean so far as she is concerned personally?

Mr. Brenner: Yes.

The Court: That would be the 1954 sale?

Mr. Brenner: Yes, Your Honor.

The Court: Do you know how much it meant, total interest of yours payable over a period of years? You told me a thousand dollars down.

The Witness: A thousand dollars in the beginning.

The Court: Do you know what the rest of it was to be in total? [57]

The Witness: I couldn't tell you the exact figure.

Mr. Brenner: Q. Are you still receiving payments from that sale, Mrs. Rosebrook?

A. Yes, small checks are coming in.

Q. In 1954 and 1955, Mrs. Rosebrook, were you living at home? Pardon me, were you living at your parents' home?

A. For about, oh, maybe eight months I had lived at home in 1954.

Q. Until approximately—

(Testimony of Lois W. Rosebrook.)

A. That was 'til somewhere around December. No, I'm sorry. I am trying to get the dates. In 1954 I had moved into the apartment—that was before Christmas of 1953, so I was in the apartment in '54 and '55.

Q. Did your father give you any instructions in early February of 1954 in regard to the sale of your interest in the property?

A. He didn't give me instructions; he told me about the sale that was coming up.

Q. And what did he tell you you should do in regard thereto?

A. He said I could make up my own mind, but that it was a very good investment and a good opportunity.

Q. Mrs. Rosebrook, what is your opinion of your father's investment ability?

A. I think he has done very well with it.

Q. Are you a shareholder in Consolidated Lands?

A. No, I am not. [58]

Q. Have you ever been? A. No.

Q. Are you an officer or director of Consolidated Lands? A. No.

Mr. Carico: Your Honor, I believe this has all been asked and answered.

Mr. Brenner: I am sorry if there is duplication, Your Honor.

Q. Mrs. Rosebrook, do you keep track of your own investments?

A. I certainly try to.

Q. Would you expand upon that a bit?

(Testimony of Lois W. Rosebrook.)

The Court: Is it necessary, counsel? She says she takes care of it. Unless it is questioned on cross-examination, we will assume that.

Mr. Brenner: I have no further questions on direct, Your Honor.

The Court: All right.

Mr. Carico: Does Your Honor wish to continue at this time? It is nearly noon.

The Court: For about five minutes, yes.

Cross-Examination

By Mr. Carico:

Q. Mrs. Rosebrook, I believe you stated that for a period of about three or four months you worked for G. W. Williams Company? [59]

A. That's correct.

Q. As a secretary? A. That's right.

Q. And your father is owner and an officer in that company? A. He is president of it, yes.

Q. During what period of time was that?

A. Well, to go backwards, I believe I stopped working there at the end of January, 1954, so I must have gone to work there sometime in the last part of—No, I'm sorry, I get my years mixed up. I stopped working there the last of January, 1955, because I was getting married in February of 1955, so then it would go back about three or four months.

Q. Now, with reference to the distribution of the property out of the trust, at the time this was distributed to you, you stated your father explained generally what the nature of the property was?

A. That's right.

(Testimony of Lois W. Rosebrook.)

Q. Had you ever held any substantial amounts of investments or income property prior to this time?

A. No.

Mr. Brenner: Immaterial, Your Honor. Completely irrelevant to this case.

The Court: Overruled. Go ahead.

Mr. Carico: Q. Would it be fair to say, then, that you were, so to speak, a babe in the woods as far as investments [60] were concerned?

A. I had never invested in anything except the house and lot I owned at that time.

Q. Can you fix the time a little more accurately—

The Court: When did you say—You say you got this property in February 1954?

The Witness: I got this property when it was dissolved in '53.

Mr. Carico: December 1953.

The Court: Oh, yes. Up to that time, then, the question was, had you ever bought any property?

The Witness: Only the original house and lot dissolved in the property settlement when I had the divorce.

The Court: Were you married before 1953?

The Witness: Yes, sir.

The Court: Oh, I see. And you, with your husband, had bought a house?

The Witness: That's right, a house and lot.

The Court: The same house and lot. All right, go ahead.

Mr. Carico: Q. Now, you mentioned that—I believe you stated early in 1954 your father brought this

(Testimony of Lois W. Rosebrook.)

proposition to you regarding the sale of this one percent interest in a certain portion of the old San Bruno Lands, is that correct? A. Yes. [61]

Q. Can you fix the date with some degree of preciseness? Was this early in January, late in January—

A. I think it was somewhere around the first part of February. [61-A]

Q. Around the first part of February? And what did he tell you in detail regarding this sale so far as the terms, the proposal that was being made?

A. Oh, I can't recall the complete and full details. I think the thing that sticks in my mind now is that the price was right, so to speak.

Q. Did he recommend this investment or sale to you?

A. Yes, and I agreed with him. It sounded like a very good idea.

Q. At that time did you know that your father was one of the owners and officers of Consolidated Lands?

A. I think by that time I realized that there were several of the same people involved, yes.

Q. Can you tell us approximately when this first came to your attention?

A. The actual sale? Is that what you are talking about?

Q. No, that Consolidated Lands Company was controlled by the same group that owned part of the land being sold.

A. Well, when I was down at my father's office, which is where I think I probably saw for the first time Mr. Wunderlich and Mr. Conway and Mr. Culli-

(Testimony of Lois W. Rosebrook.)

gan, I was right there outside the door when the Consolidated Lands meetings were being held, so I knew they were in there.

Q. You said at that time. Approximately when would that be? Approximately late January or what do you think? [62]

The Court: In respect to the time you made the sale to Consolidated lands, that is, the February 1954 sale, how long before that sale did you realize that your father and others were interested in Consolidated? A period of a year, a month, six months?

The Witness: I think it was just a very short time, and that is the best I can place it.

The Court: How long? A month, three months?

The Witness: I would say the last part of January or the early part of February.

Mr. Carico: Q. In other words, within some eight or ten days prior to the sale which took place on, I believe, February 10, 1954?

A. As I recall, yes.

The Court: Well, do you have some more?

Mr. Carico: Quite a bit more, Your Honor.

The Court: Well, we will have to take a recess until 2:00 o'clock today.

(A recess was taken until 2:00 p.m. this date.)
[63]

Afternoon Session, Tuesday,
August 23, 1960—2:00 P.M.

LOIS W. ROSEBROOK,
resumed the stand and testified further as follows:

(Testimony of Lois W. Rosebrook.)

Cross-Examination (Continued)

By Mr. Carico:

Q. Mrs. Rosebrook, in your direct testimony you made some reference to an objection to the sale of some topsoil at one time by this group. About when was that contemplated sale—when did it take place, or when was it to take place?

A. I cannot remember the exact time.

Q. Can you place it with reference to the date of the particular transaction we are now talking about; in other words, the sale to Consolidated?

A. Wait. I time these things by where I was at the time, and we had moved into the house around June, 1955, so it was probably in the fall of 1955.

Q. In other words— A. No, 1956.

Q. In other words, it would be then—

A. Probably about the fall of 1956, I think, because that is when we would be buying topsoil.

Q. A little over two years after the sale to Consolidated?

A. A year and a half, I guess. February, 1954—1955—

Q. About two and one-half years. Now, how were you first [64] advised of this proposed sale of topsoil?

A. A memorandum had come around saying an offer had been made on the topsoil and was it agreeable to sell it at this price.

Q. That memorandum was issued by whom?

A. I believe by Mr. Williams.

Q. Mr. Williams individually?

A. I don't remember.

(Testimony of Lois W. Rosebrook.)

Q. As far as other decisions with respect to the use of the land, in what manner were those made?

A. The decisions that were put up to the members, the tenants in common, would come out in a memorandum.

Q. And again, who prepared that memorandum or those memoranda?

A. I don't know who put all the facts together. Many times it would come from my father.

Q. It came from your father? Other than the topsoil did you object to anything else that occurred?

A. No, I don't believe so.

Q. Now, you mentioned something about suggesting meetings at the home of your father, or meetings that took place at the home of your father at your suggestion, to discuss the investments that were distributed to you. With respect to this particular transaction what, if anything, was discussed at those meetings? [65]

A. As I said, I don't recall too much after the trust was actually dissolved aside from explaining that I had my own share and could do with it as I wanted until this actual discussion about selling it, which was at the end of January or beginning of February 1954.

Q. Now, you also stated that you exercised independent judgment as to this sale. On what facts was that judgment based so far as the respective value of the land?

A. So far as the value I went on my father's opinion, and so far as deciding to sell, if you could make double your money that sounded fine.

(Testimony of Lois W. Rosebrook.)

Q. But you made no independent inquiry on your own as to the value of your particular interest?

A. Not so far as going out to have it appraised, no.

Q. Do you know how the price was arrived at that was offered for this acreage?

A. Well, as I remember the thing, it was that after the trust had been dissolved and I received my share, and I think as discussions went on—the land was bought with the idea that it could be worth more or would be worth more than the price that it was bought at, and at the time it was sold I figured, with my father's opinion, this was a good thing.

Q. You said that—maybe I misunderstood, but did you say that the land was bought with the expectation that the price would be more than was paid for it? [66]

A. No, I said—I don't think I know what you said. I'm sorry. I think that when the trust was dissolved it was explained to me that the land was bought at what they thought was a very good price. In other words, I believe Mr. Williams, my father, felt that it was worth more at the time than what he paid for it.

Q. Did he say anything else about what the land was worth or what was contemplated at the time it was purchased?

A. No. So far as I recall, it was held for an investment because sometime they were going to run out of flat lands to build on.

Q. Between the time that the trust was dissolved and the date of your sale of the interest in Consolidated Lands Company did you make any other sales of any of the investments in the trust? A. No.

(Testimony of Lois W. Rosebrook.)

Q. What was your next transaction after the sale made to Consolidated Lands Company with respect to the former trust assets?

A. I think that was the early part of 1956 when the Navy condemnation suit went through and they condemned about 53 acres.

Q. In other words, for a period of about two years the only transaction was this sale to Consolidated Lands? A. That's right. [67]

Q. I believe you stated in your direct testimony that you valued your father's opinion in investments quite highly. I am paraphrasing it, but I believe that was the general tenor of your testimony; is that correct?

A. Yes, he has done very well.

Q. Have you on any occasion refused to follow his recommendations or handling of the former trust property? A. No.

Mr. Carico: May I see Plaintiff's last two exhibits, please?

Q. Now, I notice on Plaintiff's Exhibit 2, on the last page thereof, I believe this is your signature; is that correct? A. That's correct.

Q. And would you read what appears just above the signature lines? A. You mean up there?

Q. Yes.

A. "The undersigned hereby approves the foregoing accounting and consents to the expenditures as described therein."

Q. Would you examine the disbursements reflected on pages 1 and 2 for a second, please? A. Yes?

Q. With respect to the disbursements appearing on

(Testimony of Lois W. Rosebrook.)

pages 1 and 2, were you consulted prior to the time any of those [68] payments were made?

A. Memorandums would come around on the tax bills and the amount we would have to pay the First Western Bank on interest especially.

Q. So that interest on tax bills would be substantially all that—

A. (Interposing) All that I can recall. Unless these other things were lumped in such as payroll, secretarial overtime, and so forth. I can't recall that as such.

Q. Do you know who authorized those expenditures originally, other than the tax bills and the interest payments? A. Not as an individual, no.

Q. Now, with respect to this sale of—I believe it is commonly referred to as the "Navy property," the condemnation sale—you stated on direct examination that that was given capital gains treatment on your income tax returns? A. That is true.

Q. At the time you received the assets of the trust what were you told, if anything, was the reason for retaining just this particular piece of property; in other words, the Navy property?

A. At the time I received the trust I don't think anything was said about retaining just that part of the property.

Q. At the time of the sale to Consolidated Lands, then, what if anything was said about the reason that this particular [69] piece of property wasn't—

A. There were negotiations for a lease on the Navy property. I guess they had had it for a dollar a year

(Testimony of Lois W. Rosebrook.)

for so long that they decided to condemn it and not pay so much more, as they originally did. But I believe the original 884 acres of that, that was all they wanted.

Q. At the time of the sale to Consolidated wasn't there also a piece of land retained for shopping center purposes? A. Retained by whom?

Q. I am sorry, by the group?

A. You mean the tenants in common kept that apart?

Q. Retained a part for use as an eventual shopping center?

A. I don't think it was ever explained to me there was 80 acres, which is the part you are talking about, that was kept out for that purpose.

Mr. Carico: I have no further questions, Your Honor.

Redirect Examination

By Mr. Brenner:

Q. Mrs. Rosebrook, did you ever look to anyone else for investment advise of any sort besides your father? A. Yes.

Q. Who?

A. I have consulted with my husband and also talked to one or two brokers as far as investment possibilities.

Mr. Brenner: I have no further questions. [70]

The Court: All right.

(Witness excused.)

Mr. Brenner: I would like to call George W. Williams as my next witness.

GEORGE W. WILLIAMS,

called as a witness by the plaintiff, being duly sworn,
testified as follows:

The Clerk: Please state your name and occupation
to the Court.

The Witness: George Wesley Williams.

Direct Examination

By Mr. Brenner:

Q. What is your address, Mr. Williams?

A. 3205 Ralston Avenue, Hillsborough, California.

Q. What is your occupation, Mr. Williams?

A. Well, I am an officer of a corporation.

Q. Does this constitute the majority of your income and take up the majority of your time?

A. Yes, sir.

Q. In December of 1953, Mr. Williams, were you the trustee of a trust for the benefit of the plaintiff in this case?

A. Yes, I was.

Q. Generally speaking, what was the nature of the trust assets at that time?

A. Well, the trust assets consisted of some real estate [71] holdings and some stock in some corporations.

Q. Would you expand upon the real estate holdings a bit and tell us what they constituted?

A. Well, there was a—what we call the Ford Building or a building rented to the Ford people, and also a building rented to the Buick people, the Buick agency in San Bruno, and the trust had an interest in some San Bruno land property.

Q. Focusing on the interest in the San Bruno land

(Testimony of George W. Williams.)

property, would you elaborate on that a little bit more?

The Court: You can ask him leading questions so we can get on with it.

Mr. Brenner: Thank you.

Q. I think it was stipulated, Mr. Williams, in the record that the trust had a one percent interest in 1159 acres in real property in San Bruno. Does that agree with your memory? A. Yes, it does.

Q. How did the trust acquire this interest in that property?

A. Well, at the time that I was negotiating for the acquisition of the entire property with the Mills Estate and with people to acquire an interest, as trustee I included a one percent interest in the purchase of the property in this particular trust.

Q. When was that?

A. In 1953. About May, I guess. [72].

Q. What was the solvency or cash position of the trust in May, 1953?

A. Well, I would say the trust had cash or bonds in excess of \$10,000, plus its various real estate holdings and stocks.

Q. Do you know how much cash it actually had, or approximately?

A. I don't recall the exact amount. I would say over 10,000.

Q. We have stipulated, Mr. Williams, that the interest was actually acquired by purchase of the stock of San Bruno Lands Company and then the dissolution of the San Bruno Lands Company and distribution to the tenant in common. Does that meet with your memory?

(Testimony of George W. Williams.)

A. The interest of the trust was paid for in cash.

Q. Do you know how title was taken?

The Court: To what? The stock?

Mr. Brenner: Q. To the underlying land?

A. Well, initially title to the land was taken in three trustees who were acting for a group participating in the purchase of the whole property.

Q. What was the purpose of that, do you know?

A. We were only able to purchase the land by purchasing the corporation which owned the land, and the owners of stock made it a condition that they would not negotiate the sale with over [73] two or three people.

Q. Who were those people?

A. The ones who were acting in that capacity for the purchase were Martin Wunderlich, Andrew Conway and myself.

Q. Then how did title ultimately devolve into the trust?

A. The corporation was immediately liquidated and the real property was transferred to the three trustees, in effect, which I have mentioned, or three agents, and they in turn immediately quit-claimed their interest in the property in accordance with the agreement with the others who were to participate in the proposition that they were to participate in.

Q. How did you, as trustee, take title on behalf of the trust; do you recall?

A. I took title to this property in my own name as trustee for my daughter Lois.

Q. In your fiduciary capacity as trustee, Mr. Williams, what was your purpose in making this purchase?

(Testimony of George W. Williams.)

The Court: What purchase? The purchase of the San Bruno Land Company, or the stock?

Mr. Brenner: I am sorry, Your Honor.

Q. The purchase of the trust interest in this investment.

A. Well, I was hoping to make a very good investment for my daughter.

Mr. Brenner: Q. Would you enlarge upon that a bit?

The Court: Well, I get it. That's all right. [74]

Mr. Brenner: Q. What factors in particular made you think it was a good investment?

A. Well, I was very familiar with the land in this area and with the development of the Peninsula in particular and I realized that the flatter lands which had been developed up to that time, were becoming very scarce, and I considered this property, which involved some hilly land as well as some strategic land suitable for a shopping center, to be very reasonably priced on the basis of the price quoted, and I just thought it was a good investment—a very good investment.

Q. As trustee, in your fiduciary capacity, what relationship with the other investors did you intend to enter?

Mr. Carico: Objection, Your Honor.

The Court: Sustained. You can go into the agreements and conversations if you wish.

Mr. Brenner: Q. Mr. Williams, do you know how the agreement or the deeds describes your relationship with the other investors?

The Court: Have you got the deed or agreements?

(Testimony of George W. Williams.)

Mr. Brenner: They are not in evidence, Your Honor.

The Court: All right.

The Witness: Well, the property was to be acquired in an undivided interest and we would all be free agents.

Mr. Brenner: Q. Focusing on the distribution, now, to the trust of this one percent interest, Mr. Williams, how was [75] that mechanically done?

A. The trusts were dissolved by deeding out the land directly from me as trustee to my daughter, and by making suitable documents transferring any personal property, assigning personal property to her from me as trustee.

Q. Did she indicate her willingness to accept this property at that time?

A. Yes, sir.

Q. How did she do that?

A. Well, the property was documented and I told her I was giving up the trust and the property that she would receive and what her obligation would be, and she agreed to accept the property.

The Court: What do you mean, what her obligation would be? What did you say to her in that respect?

The Witness: Well, in connection with taking over the property I explained that from the time she took it on it was her responsibility and she would have to look after it.

Mr. Brenner: Q. Do you have personal knowledge that the deed you referred to distributing the property

(Testimony of George W. Williams.)

out of the trust to Lois W. Rosebrook was personally delivered to her? A. Yes, sir.

Q. At that time did you attempt to familiarize Lois W. Rosebrook with the asset picture of the trust and the assets which would then be distributed to her? [76]

A. Yes, I described them in detail and told her about the properties and the problems of management and tried to convey as much information with respect to them as I could.

Q. How was this done?

A. Well, as to Lois, I explained to her at a separate meeting and then subsequently we had family meetings at which I elaborated on the management of property, et cetera.

Q. When you distributed the assets out of the trust did you attach any conditions to the distribution at that time?

A. No, there were no conditions.

Q. Either oral or written?

A. There were no conditions whatsoever.

Q. Was there an understanding that you would still be able to effectively control the use or distribution of this property? A. No.

Mr. Carico: Objection. That is speculative.

The Court: Well, technically, I suppose, what the understanding was is a conclusion. You can ask what was said and done between them.

Mr. Brenner: Q. Was there anything said about what their obligations were with regards to this property?

A. Well, of course, that they were to take care of

(Testimony of George W. Williams.)

it, to manage the property, and they had no further obligations.

Q. Was anything said in regard to what you—well, was [77] anything said that you still expected to have some degree of control over this?

A. No, quite the contrary, I told them it was their full responsibility.

Q. Did you have a power of attorney with Lois W. Rosebrook, either in her present name or her prior names, as grantor and you as grantee at that time?

A. No, sir.

Q. Do you have now? A. No, sir.

Q. Have you ever had? A. No, sir.

Q. We have stipulated, Mr. Williams, that the plaintiff, Lois W. Rosebrook, sold an interest in a portion of the acreage on February 10, 1954. Did you and the plaintiff discuss the impending sale?

A. Yes, sir.

Q. Do you know when you first discussed that with her?

A. Well, I imagine it was just prior to the sale.

Q. Generally, what did you tell her at that time?

A. Well, I told her that the property was contemplated to be sold, that it was the hilly portion of the property, and that it could be sold for approximately twice the price paid for it, and that I thought it was a suitable deal for her.

Q. How many acres were involved in that sale at that time, do you know? [78]

A. Approximately 860.

The Court: When you entered into the agreement

(Testimony of George W. Williams.)

in April, 1953, with these associates, were those written agreements, the two agreements of April, 1953?

A. The only written agreement was in connection with the agreements having to do with the actual purchase, which were common agreements with the seller. I don't recall any—

The Court: (Interposing) I mean the two agreements which you signed or which you made in April, 1953, with Burrows, Conway, Wunderlich, Culligan and so forth, regarding the purchase of stock on the San Bruno Land Company and regarding the intention to hold for six months and then sell it to a corporation for development. There were two agreements in which that general idea was contained, is that true?

The Witness: No. As regards the purchase of the property, the only agreements in connection with the purchase had to do with the cost of the property and how the corporation would be liquidated and how the property would get back to the individuals.

The Court: All right. Were those agreements in writing?

The Witness: Well, that particular agreement was the particular agreement to buy and sell, and that was in writing.

The Court: Counsel, you know what I am getting at, don't you? [79]

Mr. Brenner: Yes.

The Court: Are there two written agreements in existence?

Mr. Brenner: No, Your Honor. There is a written agreement dated April 23, 1953.

The Court: Yes.

(Testimony of George W. Williams.)

Mr. Brenner: There is also a piece of paper which purports to be a memo dated April 23, 1953.

The Court: All right. Are they in evidence yet?

Mr. Brenner: No, Your Honor, they are not.

We contend that insofar as the plaintiff in this case is concerned they are completely immaterial and irrelevant.

The Court: Well, I was going to ask, did the trust as such appear as a party to those agreements?

Mr. Brenner: Yes, they did, Your Honor. To one of them, Your Honor. To the one which purports to be an agreement.

The Court: All right.

Mr. Brenner: Q. Mr. Williams, I show you now a document entitled "Agreement."

The Court: Pardon me, counsel. I am not importuning you to offer them now. You can use your own judgment.

Mr. Brenner: These are subsequent documents, Your Honor.

Q. —which is marked Exhibit 6-F to the stipulation which we entered into here today. Can you tell us briefly what that [80] purports to be?

A. Well, this agreement appears to be an agreement covering the sale to Consolidated Lands, Incorporated.

Q. The sale to Consolidated Lands, Incorporated?

A. Yes, sir.

Q. What is the date of this agreement?

A. February 10, 1954.

Q. Now, I am indicating now a signature which

(Testimony of George W. Williams.)

purports to be that of Lois Hortense Williams Aull. Do you know personally that Lois Hortense Williams Aull signed that? A. Yes, I do.

Q. Do you recognize that as her signature?

A. Yes, sir.

Q. And is she the plaintiff herein?

A. Yes, sir.

Q. Now known as Lois W. Rosebrook?

A. Yes.

Q. Now I show you what purports to be a grant deed marked Exhibit 7-G to our stipulation which we have entered herein, and ask you to briefly describe that.

The Court: You don't have to describe it. Just identify it. We can look at it.

Mr. Brenner: It's the deed which conveyed the 884 acres from the tenants in common to Consolidated Lands.

The Court: Is that in evidence? [81]

Mr. Brenner: Yes, it is.

Mr. Carico: Your Honor, we will stipulate that it was signed by the plaintiff in this case, Mrs. Rosebrook.

Mr. Brenner: That is all I wanted.

The Court: All right.

Mr. Brenner: Q. Referring, Mr. Williams, to the family meetings which you testified were held, at whose instigation were they started or at whose suggestion?

A. Well, the meetings were—the idea of the meetings was suggested by Lois, my daughter.

Q. We have stipulated that originally 1159 acres were acquired and subsequently evidence has been intro-

(Testimony of George W. Williams.)

duced that 884 of those acres were sold February 10, 1954. Subsequent thereto were there any sales of the underlying land?

A. Subsequently we sold 80 acres to Consolidated Lands, a shopping center site.

Q. And when was that?

A. I don't recall the exact date.

The Court: August, wasn't it, 1954?

Mr. Brenner: Yes. We have stipulated to August, 1954—1956, Your Honor.

The Court: I beg your pardon; 1956.

Mr. Brenner: Q. Do the tenants in common still hold any of the underlying land of the 1159 acres?

A. Yes, they own the more level land, the more centrally located land which is particularly suitable for an investment [82] type building.

Mr. Brenner: I have no further questions at this time, Your Honor.

Cross-Examination

By Mr. Carico:

Q. Mr. Williams, you are the father of the plaintiff, Mrs. Rosebrook, herein, is that correct?

A. I am.

Q. Are you presently yourself involved in a dispute with the Internal Revenue Service involving your particular share of the sale of this land to Consolidated Lands Company?

Mr. Brenner: Objection on the grounds that it is immaterial and irrelevant to this taxpayer.

The Court: What is the purpose of this?

(Testimony of George W. Williams.)

Mr. Carico: Well, Your Honor, it does raise this point: Mr. Williams, I am sure—

The Court: (Interposing) What is the purpose of it?

Mr. Carico: To demonstrate that his answers admittedly may be used against him as admissions.

The Court: In other words, you want to impeach his testimony by showing his interest?

Mr. Carico: Showing his interest and—

The Court: All right. Go ahead, I will allow it.

The Witness: What was the question again?

Mr. Carico: Well, will the reporter please read it back? [83]

The Court: Reframe it and save time.

Mr. Carico: All right.

Q. Are you presently involved in dispute with the Internal Revenue Service regarding your sale, or your portion of the sale, to Consolidated Lands Company?

A. I would say so, yes.

Q. And you recently testified in a Tax Court hearing involving a sale concerning your other daughter, Mrs. Barryman? A. Yes, sir.

Mr. Brenner: Objection, Your Honor, that is immaterial and irrelevant to this taxpayer.

The Court: Overruled for the limited purpose for which he is asking it. Go ahead. He has answered it already.

Mr. Carico: Q. Mr. Williams, you stated that your occupation was that of an officer of the corporation. Are you an officer of G. W. Williams Company?

A. Yes, sir.

(Testimony of George W. Williams.)

Q. You own a 50% interest in G. W. Williams Company? A. Yes, sir.

Q. What type of business is G. W. Williams Company?

A. Well, its principal business now is mortgage loans and investment in shopping center and apartment house property.

Q. Was G. W. Williams Company in business in 1953? A. Yes, sir.

Q. What was its business at that time? [84]

A. Well, the same business except for the mortgage loan part of it, and I don't recall whether or not we had stopped building houses in 1953 or not, but it was about that time we stopped building houses.

Q. Previous to 1953 you had been, in, say, the residential development business?

A. Yes, I think that would cover it.

Q. Are you also interested in the firm of Williams & Burrows? A. Yes, sir.

Q. What type of organization or corporation or partnership is Williams & Burrows?

A. It's a corporation and it—

The Court: Pardon me just a minute. What company is this?

Mr. Carico: Williams & Burrows—B-u-r-r-o-w-s.

The Witness: It is a corporation, and it is a general contracting company.

Mr. Carico: Q. Have you ever been, or are you presently a member of the partnership known as American Homes Company?

A. American Homes Company is a corporation.

(Testimony of George W. Williams.)

Q. This is as distinguished from American Homes Development Company. Was there ever a partnership known as American Homes Company in which you were interested?

A. American Homes Company is a corporation.
[85]

Q. Possibly my notes are wrong. What type of business is American Homes Company?

A. Well, I would say it's an investor in real property.

Q. Does it build homes? A. No, sir.

Q. It buys real property? A. Yes, sir.

Q. Sells real property?

A. Well, it hasn't sold much, but it has bought and sold property.

Q. Are you also interested in Hallmark Homes, Incorporated? A. Yes, sir.

The Court: Hallmark?

Mr. Carico: Hallmark.

The Court: Well, you didn't tell me whether he is interested in the American Homes Company.

Mr. Carico: There seems to be some confusion in my own notes about that, Your Honor.

The Court: All right. Let's get on to something.

Mr. Carico: Q. Is Hallmark Homes—what type of business is Hallmark Homes in?

A. Hallmark Homes is a corporation that has investments.

Q. Does Hallmark Homes participate in a joint venture known as Luego San Bruno?

Mr. Brenner: Objection, Your Honor. This is irrelevant. [86]

(Testimony of George W. Williams.)

The Court: Well, it is all irrelevant so far as I am concerned. You haven't even shown that he has any connection with those places.

Mr. Carico: I have asked, I believe, Your Honor—I have prefaced each question with whether he is interested in it.

The Court: "Interested in" doesn't mean anything. He might be interested in art. Let's find something out about it.

Mr. Carico: Q. As to G. W. Williams Company then, you own 50% of that, is that correct?

A. Yes.

Q. You are an officer of the corporation?

A. Yes, sir.

Q. You are a director of the corporation?

A. Yes, sir.

Q. As to Williams and Burrows, what is your percentage of ownership in that?

Mr. Brenner: Your Honor, I am going to object on the grounds that it is completely immaterial how much interest this gentleman owns in those companies when the taxpayer here is Lois W. Rosebrook.

The Court: It may be. All right. Overruled. Go ahead.

Mr. Carico: Q. As to Williams & Burrows, how much interest do you own in that? [87]

A. Oh, I think in it individually it is probably 20 or 30 percent. I don't recall my individual ownership in that company.

Q. You are a director of that firm?

A. Yes.

Q. You are an officer of that firm?

A. Yes, sir.

(Testimony of George W. Williams.)

Q. American Homes Development Company, you are a 50% stockholder in that firm or corporation?

A. I believe so, yes, sir.

Q. You are an officer of that corporation?

A. Yes, sir.

Q. You are a director of that corporation?

A. Yes, sir.

Q. Hallmark Homes, Incorporated, what is your percentage of ownership in that?

A. Well, I don't recall exactly.

Q. Are you an officer of Hallmark Homes, Incorporated? A. Yes, sir.

Q. You are a director of Hallmark Homes, Incorporated? A. Yes, sir.

Q. Now, in connection with your activities with the aforementioned corporations, have you negotiated for the purchase of various tracts of land?

Mr. Brenner: Your Honor, I am going to object on the [88] grounds that whether he has negotiated for the purchase of tracts of land is completely irrelevant and immaterial to the taxpayer here, who is the plaintiff in this case.

The Court: Well, it may be immaterial to the ultimate decision, but it may affect some issue. Overruled.

The Witness: Well, as an officer of the corporation I have had something to do with the negotiations, and negotiations might have been made by other employees but I have a chance to look at them at some stage.

Mr. Carico: Q. You have also supervised the development and improvement of certain areas and tracts of land owned by these corporations?

(Testimony of George W. Williams.)

Mr. Brenner: Same objection, Your Honor. I think we are getting further afield all the time.

The Court: We are.

Let's bring it around and get right down to the point and we will allow it.

Mr. Carico: Q. Have you negotiated for the sale of land in these aforementioned corporations?

Mr. Brenner: Same objection, Your Honor.

The Court: Overruled. Go ahead.

A. Well, where any properties have been sold I would have had to approve the sale.

Mr. Carico: Q. All right, fine. Now, you stated that in 1953 you acquired on behalf of the corporation a one percent [89] interest—I mean in behalf of the trust, a one percent interest in what is known as the San Bruno Land, or land formerly owned by the San Bruno Lands Company. Was that interest acquired—well, strike that.

The Court: No, don't strike it. It is fine so far as it goes. Go ahead.

Mr. Carico: Q. That interest was acquired acting under your own discretion as trustee, is that correct?

A. Yes, sir.

Q. Under the trust agreement you had unlimited discretion as trustee?

A. Yes, sir.

Q. When was that idea first formulated in your mind to acquire the land owned by San Bruno Lands Company?

Mr. Brenner: This is immaterial and irrelevant to this taxpayer, Your Honor.

(Testimony of George W. Williams.)

The Court: It doesn't add much to me, who formed the idea. Let's find out what he did.

Mr. Carico: All right.

Your Honor, may I be heard respecting this for a second?

The Court: Go ahead, we will hear it.

Mr. Carico: Q. When did you first formulate the idea of acquiring the land belonging to the San Bruno Land Company?

A. Well, I think I learned of it somewhere from six months to a year prior to the sale, that it was available, and [90] then is when I started working on it.

Q. That would be late in 1952?

A. I would say so.

Q. Would you say that you were the moving party in getting together the group of persons to purchase the land?

Mr. Brenner: I am going to object to that, Your Honor. There has been no testimony about any group. This is, so far as I know, the first time the word "group" has been mentioned.

The Court: I know. It's all right. It will work out. Go ahead.

Mr. Carico: Your Honor, on direct examination he mentioned the word "group."

The Court: Go ahead, please.

Mr. Carico: Q. Were you the moving party in getting together the group to acquire this land?

A. I would say so, yes.

Q. And who were the major parties you brought together to provide the financing for this acquisition?

(Testimony of George W. Williams.)

Mr. Brenner: Same objection, Your Honor, irrelevant and immaterial to this taxpayer, who is the one party here.

The Court: Overruled. Go ahead. Isn't this stipulated to? No mystery about it is there?

Mr. Carico: No, Your Honor, it is not stipulated to.

The Court: Go ahead, then.

The Witness: Well, there were a number of parties, but [91] the parties with the larger interests were Martin Wunderlich and Conway & Culligan and—

Mr. Carico: Q. Frank Burrows?

A. Frank Burrows participated and I participated and the trust participated.

Mr. Carico: May I have this marked as Defendant's Exhibit next in order?

(Copy of agreement marked Defendant's Exhibit A for identification.)

Mr. Carico: Q. Now, in your direct testimony you made reference to an agreement entered into by these parties for the purchase of the stock of the San Bruno Land Company.

I ask you to examine this document here.

Mr. Carico: Incidentally, Your Honor, there has been a stipulation among counsel in this case that copies are permissible throughout.

The Court: All right. If there is any question about it, just ask him if that is his signature and identify it and offer it.

Mr. Carico: Q. Does your signature appear on this document, Mr. Williams? A. Yes, sir.

Q. Is this the agreement you referred to in your

(Testimony of George W. Williams.)

direct testimony regarding the acquisition of the San Bruno Lands Company stock? [92]

A. Yes, sir.

Mr. Carico: May I offer this as Defendant's Exhibit A in evidence.

Mr. Brenner: No objection, Your Honor.

(Defendant's Exhibit A for identification received in evidence.)

The Court: That is one of the agreements of April 23rd, is that correct?

Mr. Carico: That is one of the agreements of April 23rd, yes, Your Honor.

The Court: Let me take a look at it. Go right ahead.

Mr. Carico: Q. Now, at the time this particular agreement was entered into or executed did you and the other members of the group discuss your subsequent plans to develop the property?

Mr. Brenner: Objection, Your Honor. Whether or not they had any plans or had any discussions in regard to plans is irrelevant and immaterial and hearsay as to this taxpayer. Before they can introduce such evidence they have to lay a foundation for the existence of a partnership or joint venture or some other relationship before it becomes relevant to this taxpayer.

Mr. Carico: Your Honor, may I be heard on this?

The Court: No. Overruled. Go ahead.

The Witness: May I have the question again? [93]

Mr. Carico: Q. At the time the agreement that is now in His Honor's hands was executed did you and the other members of the group also discuss what your

(Testimony of George W. Williams.)

plans were with respect to this property that was ultimately to be acquired?

The Court: Pardon me, just one question before that. This agreement of April 23rd, which you just looked at, in the amounts of money referred to in the agreement is included, I take it, such amount of the trust funds as would constitute one percent of the purchase price, is that correct?

The Witness: Yes, sir, that is correct.

The Court: All right, go ahead.

The Witness: Well, the group, as such, discussed the property and its potential very carefully and considered any number of possibilities which were related to the income which we might expect to receive and whether or not we were able to receive enough income to carry the property for a certain length of time, and all that sort of thing. Yes, sir, we considered it very carefully.

Mr. Carico: Q. As a result of those considerations did you reduce your verbal agreement to writing?

A. We didn't have a verbal agreement as to all of the considerations.

Q. Mr. Williams, I will ask you to look at—excuse me.

Mr. Carico: I will have this marked as Defendant's Exhibit next in order. [94]

(Certificate dated April 23, 1953, marked Defendant's Exhibit B for identification.)

Mr. Carico: Q. Would you examine this document and tell me if your initials appear on page 1 thereof?

Mr. Brenner: Your Honor, I am going to object

(Testimony of George W. Williams.)

to that document. Counsel hasn't shown it to me yet. I think I know what it is.

The Court: Show it to him.

Mr. Carico: I just asked counsel before I introduced it, Your Honor.

Mr. Brenner: Anything that they might have reduced to writing of the Commissioner, I cite the case of *Niederkrome v. the Commissioner*, decided by the Ninth Circuit recently, where they held that the minutes of an executive committee meeting of the company other than the taxpayer was hearsay as to the taxpayer.

I also cite *Standard Oil vs. Moore* in this connection.

The Court: It may be. However, overruled. Go ahead.

Mr. Carico: Q. Do your initials appear on page 1 of that agreement, Mr. Williams? A. Yes, sir.

Q. Your initials appear on page two of that document? A. Yes, sir.

Mr. Carico: Your Honor, I offer this as Defendant's Exhibit B in evidence. [95]

The Court: What is that?

Mr. Carico: This is a memorandum of the verbal understanding of the parties as to what was to be done with this property.

Mr. Brenner: Your Honor, I object to its admission on three grounds, that is hearsay, that it is irrelevant, and that it is immaterial.

The Court: Overruled. It might not be important in the ultimate decision, but in view of this agreement and that funds of the trust were included in it, I will allow it.

(Testimony of George W. Williams.)

Mr. Brenner: Does Your Honor consider it necessary for counsel to take an exception to your ruling?

The Court: Your exception will be noted.

Mr. Brenner: Thank you.

Mr. Carico: Your Honor, may I interject this one point here?

The Court: No. Just proceed.

(Defendant's Exhibit B for identification received in evidence.)

The Court: Well, let's take five minute's recess.

(Short recess.)

Mr. Carico: Q. Now, after the purchase of the San Bruno Land Company stock, the corporation was liquidated and you and Mr. Wunderlich and Mr. Conway took title to the land as tenants in common, is that correct? [96]

A. Yes, sir.

Q. In order to accomplish this purpose or this acquisition did you obtain some temporary financing from a San Francisco bank?

A. In the acquisition we acquired temporary financing from the American Trust Company and the San Francisco Bank advanced some of the permanent financing later.

Q. How much was advanced by the American Trust Company?

A. Well, as I recall, their original loan was around \$750,000 which was paid immediately upon completion of the purchase of the stock, and then the land was encumbered and some of the funds from that helped to pay out these other charges.

(Testimony of George W. Williams.)

Q. Now, with respect to the financing obtained from the San Francisco Bank, was that obtained on a 5-year note?

A. No, as I recall it was on a short-term basis. I am a little hazy on that, but I know the conditions were very severe and I think the note only ran for one year.

Q. A 1-year note? What was the amount of that note?

A. The total was supposed to be \$500,000, I think, and a lesser amount was advanced.

Q. It was four hundred and fifty thousand—(inaudible to the reporter).

A. It was a lesser amount, as I recall it.

Q. Now, on June 8, 1953, did you, Mr. Wunderlich, Mr. Conway [97] quit-claim the land acquired from the San Bruno Lands Company to the entire group of tenants in common?

A. We quit-claimed and I believe that is the date, yes, sir.

Mr. Carico: May I have this marked?

(Document entitled Quit-Claim Deed marked Defendant's Exhibit C for identification.)

Mr. Carico: Q. Here are a couple more documents for you to look at. Will you tell me whether your signature appears on page 2 of that document?

A. Yes, it does.

Q. Is that the deed by which you conveyed the undivided interests to the group?

A. It appears to be a copy of a deed, yes.

(Testimony of George W. Williams.)

Mr. Carico: I offer this as Defendant's Exhibit C in evidence.

Mr. Brenner: No objection.

(Defendant's Exhibit C for identification, received in evidence.)

Mr. Carico: Will you mark this, please?

(Document, Assignment of Leases, marked Defendant's Exhibit D for identification.)

Mr. Carico: Q. Now, on that same date did you also execute an assignment of the leases held by San Bruno Land Company and acquired by yourself and Mr. Wunderlich and Mr. Conway to the other tenants in common? [98]

A. We executed an assignment and I presume it was on the same date.

Q. Would you examine this document and tell me if your signature appears on page 2 thereof?

A. Yes, sir, it does.

Q. Is that a copy of the assignment of leases, Mr. Williams? A. Yes, sir.

Mr. Carico: I will offer this as Exhibit D in evidence.

Mr. Brenner: No objection.

(Defendant's Exhibit D for identification, received in evidence.)

Mr. Carico: Q. Mr. Williams, at the time the quit-claim deed and the assignment just referred to were executed, did you, Mr. Conway and Mr. Wunderlich receive from the entire group of tenants in common

(Testimony of George W. Williams.)

a power of attorney dealing with the handling of the land?

A. We had a power of attorney dealing with the leases and I presume it extended to the land. I don't recall it.

Q. Would you examine this document and tell me if your name appears on page 2 thereof?

A. Yes, sir, it does.

Q. And does your name also appear on page 2 as trustee for the trust of the present plaintiff herein?

A. Yes, sir, it does.

Mr. Carico: I offer this as Defendant's Exhibit next [99] in order in evidence.

Mr. Brenner: No objection.

(Document entitled "Power of Attorney" admitted in evidence as Defendant's Exhibit E.)

Mr. Carico: Q. Now, Mr. Williams, I believe you stated on direct examination that you made this investment or made this purchase on behalf of the trust because you considered it a good investment, is that correct? A. Yes, sir.

Q. What were the rentals produced by this land acquired from the San Bruno Land Company at the time?

A. Well, at the time of acquisition the rentals were very nominal.

Q. About \$615 approximately?

A. I was going to say 700. That is approximately right, yes, sir.

Q. And these were from leases to flower growers and sheep grazers or for agricultural purposes?

(Testimony of George W. Williams.)

A. The principal income was from agriculture and there was one dollar being paid by the Government for a very substantial part of the land—one dollar per year.

Q. That one dollar being paid by or on behalf of the United States Navy? A. Yes, sir. [100]

Q. And that was for a portion of the land that was not later transferred to Consolidated is that right?

A. Yes, sir.

Q. These rentals were subsequently increased to roughly \$1,070, isn't that correct?

A. Immediately after the acquisition we raised all of the agricultural rentals, yes, sir.

Q. Effective in November, 1953?

A. Well, almost immediately after acquisition. As soon as we could. I don't recall the effective date.

Q. Mr. Williams, with respect to this property which you have characterized as a good investment I would like to ask if you know what the normal return on real property is in the Peninsula area south of San Francisco, investment real property?

A. Well, I don't think there is any such thing as a normal return. There are returns that people hope to get from property. A normal return would be, say 6% on some property and on others it would be 10%.

Q. It would not be lower than 6% though?

A. I would say on investment acquired with the expectation that it would pay less than 6%, it would not qualify as an investment unless it were expected that the property would appreciate fast enough to generate 6% or more.

Q. Do you know what the taxes were on this

(Testimony of George W. Williams.)

property [101] acquired from San Bruno Land Company?

A. I do not recall, no.

Q. After these transactions whereby San Bruno Land Company was acquired, dissolved and the land went to all the tenants in common, how was the property managed, the real property?

A. Well, the management of the real property was comparatively simple. In connection with the leases, why, the group, we sent them out notices, as I recall, advising of the increased rentals. We didn't have any manager of the property as such at all.

Q. Was a single bank account maintained for the property? A. Yes, sir.

Q. Were the rentals received from these agricultural leases deposited within that single bank account?

A. Yes, sir.

Q. Were expenses, other than taxes, paid from that bank account?

A. Yes, sir, minor expenses.

Q. What is that?

A. I say those were minor items. The tax was the principal item and very little was involved in connection with the handling of this property.

Q. Who gave the authorization to draw the checks for these disbursements for expenses? [102]

A. Well, I think the original committee had to give the authorization.

Q. Which committee is that? Yourself, Mr. Wunderlich, Mr. Conway and—

A. The ones that were delegated with the power of attorney to negotiate with respect to leases.

(Testimony of George W. Williams.)

Q. Mr. Williams, I show you the accounting introduced as Plaintiff's Exhibit 2.

A. Yes, sir.

Q. Would you tell me who prepared that accounting? Or let me clarify that: Who prepared the accountings during 1953 for the group?

A. Well, an employee of our company prepared the accounting.

Q. When you say "your company" you mean G. W. Williams Company?

A. G. W. Williams Company, yes.

Q. Now, with respect to the expenses, taxes on this property acquired from the San Bruno Land Company, in 1953 were those shared in proportion to the contributions or investments in the land?

A. Yes, I would say so. Taxes and everything were shared on the basis of their interest in the property.

Q. Now, with respect to this financing, did each of the tenants in common assume a proportionate share of the financing?

A. No, as I recall the Wunderlich trust didn't assume any [103] responsibility with respect to the financing.

Q. Did Mr. Wunderlich personally?

A. Mr. Wunderlich personally assumed the financing.

Q. After this land was acquired from San Bruno Land Company, didn't the group announce generally that it was available for sale?

A. No, sir, it did not. They were very careful about that because it was not for sale. If anyone had

(Testimony of George W. Williams.)

inquired they would have been told that it was not for sale.

Q. You did not consider a possible sale to a man by the name of Chris McKeon at one time?

A. We considered he might be an eventual purchaser, but after the acquisition of this property we advised it was not for sale. We were qualifying it as an investment to the best of our ability.

Q. Qualifying it in what respect? In tax respects?

A. Yes, sir.

Q. In October of 1953, were you, Mr. Wunderlich, Mr. Conway and Mr. Culligan, Mr. Burrows and I believe it is Boettcher Company instrumental in forming a corporation known as Consolidated Lands Company?

Mr. Brenner: Your Honor, I am going to object on the grounds that it is irrelevant and immaterial who are the shareholders or organizers of Consolidated Lands. The plaintiff here, Lois W. Rosebrook, has testified that she was neither a [104] shareholder, officer or director or in any way interested in Consolidated Lands, and it is immaterial who the shareholders were.

The Court: I have in mind her testimony that she had no connection with it. However, the objection will be overruled.

The Witness: As I recall, we did institute some sort of proceedings at about that time.

Mr. Carico: Q. Mr. Williams, I show you a document entitled "Articles of Incorporation of Consolidated Lands, Incorporated." Unfortunately, your signature does not appear thereon.

(Testimony of George W. Williams.)

Mr. Carico: Mr. Brenner, will you stipulate that this is a true copy of the articles of incorporation?

Mr. Brenner: Yes. I am making no objection to any of these documents under the best evidence rule.

Mr. Carico: This is unsigned, Your Honor.

Mr. Brenner: That's all right, too. Your Honor. sometimes the photographic process doesn't pick up the signatures but they are genuine copies.

Mr. Carico: Q. To the best of your knowledge, Mr. Williams, are these the articles of incorporation of Consolidated Lands, Incorporated?

A. Yes, sir.

Mr. Carico: I offer these as Defendant's Exhibit next [105] in order.

Mr. Brenner: I would like to record my objection to the articles on the grounds of immateriality, irrelevancy, and also that as to any recitals therein they are hearsay as to this plaintiff.

The Court: Yes, that is right, they would be hearsay. For the limited purpose shown—(inaudible to the reporter).

Mr. Carico: I am showing, Your Honor, that they follow exactly what they contemplated by that April 1953 memorandum.

The Court: All right. It may be admitted.

(Articles of Incorporation of Consolidated Lands, Incorporated marked Defendant's Exhibit F in evidence.)

Mr. Carico: Q. Mr. Williams, with respect to one of my previous questions, I asked you whether an announcement had been made that this land was available

(Testimony of George W. Williams.)

for sale. Possibly you misunderstood me. I would like to read you a portion of the transcript from the Tax Court trial involving your daughter, and ask you if this is not the statement which you made at that time:

“Mr. Brenner: Q. Mr. Williams, you have testified that you considered the possibility of a sale for the portion of this property. Did you fix in your own mind any timing for that sale?

“A. Well, as to this property we as members [106] of the group and individually acquired it definitely as an investment, looking forward to a capital gain, and we did not expect to entertain any offers that might be made to us and the time of which would not qualify the property for a capital gain.

“If any offers were to come in on this property, which was a possibility because an announcement had been made in event that it was available and we figured that others might be interested in offering an increase in price which might be acceptable to us in a reasonable length of time, but that was one of the considerations.”

Does that refresh your memory to any extent as to whether an announcement had been made that this property was for sale?

A. Well, in referring to “an announcement” I referred to the announcement of the purchase of the land by our group, and the land from the standpoint of investment properties and shopping center property and so forth, was available and has always been availa-

(Testimony of George W. Williams.)

ble for that purpose. I didn't mean to convey that the property was being offered for sale because it definitely was not.

The Court: Because what?

The Witness: It was not being offered for sale, definitely. [107]

Mr. Carico: Q. It was being retained to be sold to Consolidated Lands Company?

A. No, sir, it was not.

Q. Are you presently an owner of an interest in Consolidated Lands Company?

A. Yes, sir.

Q. Are you an officer of Consolidated Lands Company? A. Yes, sir.

Q. Are you a director of Consolidated Lands Company? A. Yes, sir.

Q. Now, Mr. Williams, on December 18, 1953, the trust for your daughter, Mrs. Rosebrook, was terminated, is that correct? A. Yes, sir.

Mr. Carico: May I see a copy of the trust agreement? I believe the only one we have is appended right here, the Declaration of Trust.

Q. Is it not correct that in establishing this trust you contemplated the termination on March 4, 1960, if you and your wife survived that long, or if either you or your wife survived that long?

A. Well, I don't recall the exact date. The trusts were terminated prior to the date we expected to terminate because of a ruling with respect to trusts which indicated the original purpose could not be achieved by continuing on the trust, and [108] that is the only

(Testimony of George W. Williams.)

reason they were terminated. It had nothing to do with this transaction whatsoever. [108-A]

Q. It was an income tax ruling or an estate tax ruling, or something like that?

A. Well, it was an estate tax ruling to the effect that trusts which were set up wherein the donor thereof was the trustee could not—that the property would still be included in the estate of the donor, and when that ruling came out, I wished to achieve the original objective of the trust, namely, to divest myself entirely of any interest in that property from an estate tax whatever.

Q. Now, when these assets were distributed to Mrs. Rosebrook, what did you tell her, if anything, with respect to this one percent interest in the former San Bruno Lands as to the value of it or the purpose for which it had been acquired?

A. Well, I told her this particular property had been purchased for investment, that I thought we had secured it at a very reasonable price, and that I was certain she could sell it for substantially more at some subsequent date.

Q. To your knowledge, what was the extent of Mrs. Rosebrook's familiarity with real estate investments and dealings at the time this property was distributed to her?

A. Well, I would say she had a general knowledge, being in a family where those matters were occasionally discussed, but I don't think she was an expert by any stretch of the imagination.

Q. Did she suggest, at the time this property was

(Testimony of George W. Williams.)

[109] distributed to her from the trust that family meetings be held concerning the manner in which the property should be handled and managed and organized?

A. Well, at the time or shortly thereafter she was somewhat concerned when I said that the properties were her responsibility and that she had to manage and look after it and prepare her own income tax returns, and so on, and so she thought it would be a good idea to get some further information and she suggested the family meetings which we have held from time to time since that date.

Q. In indicating her concern, did Mrs. Rosebrook state that she would like your opinion or recommendations on how the property was to be handled?

A. No, I don't recall her asking for my opinion on the matter at the time, but I am sure if she had any questions, why, she would ask me about them and I would answer her to the best of my ability.

Q. Do you know of your own knowledge if Mrs. Rosebrook thought highly of your recommendations and your business dealings in the handling of real estate?

A. Well, I hope she did. I don't know.

Q. Mr. Williams, isn't it a fact that at the time you distributed this trust you fully expected Mrs. Rosebrook would follow your wishes with respect to the San Bruno Lands?

A. Well, I hoped she would but I had no guarantee to that. [110]

Q. But you hoped she would?

A. Yes, I hoped she would. I thought it was a good deal.

(Testimony of George W. Williams.)

Q. Now, turning to the sale to Consolidated Lands in 1954, when was this first considered by the group?

A. Well, I can't say just exactly. When that was brought up, Conway and Culligan were interested in that line of procedure and the rest of us were not necessarily so. I don't recall the time.

Q. Do you happen to recall when a Mr. Orville Decker was requested to make an appraisal of this property to be sold to Consolidated Lands?

A. Well, I think that was sometime in 1954.

Q. How early in 1954?

A. I would say it must have been at or about the time of the sale of the property we would have secured that appraisal, I think.

Q. Have you experienced or have you had personal experience in appraising real property?

A. Yes, sir. I appraise them, not for other people, but for myself.

Q. Have you had any experience or have you examined any of these appraisal reports prepared, quite extensive, considering surrounding land and use to which the land can be put, offers on it, capitalized rate of return and items like that? Are you familiar with those? [111]

A. Yes, I am.

Q. Usually they are done up in a nice, fancy cover and—

A. I can't say I always agree with them, but I understand what they are getting at. On real estate everyone has to make their own appraisal based upon the information they have.

Q. Now, is that a process that can be done over

(Testimony of George W. Williams.)

night or within, say, one or two days, say, with a tract of land amounting to some 860 acres?

A. To an experienced investor, I would say that he might come closer to the true value of a piece of property than probably some of these M.A.I. appraisers who appraise it because he might have a little more vision than they do and realize the potential of a piece of property more than an appraiser might give credit to.

Q. You were a director and officer of the Consolidated Lands at the time it was purchased from the group?

A. Yes, sir.

Q. What was your title as an officer?

A. I was president of Consolidated Lands.

Q. Did you conduct negotiations on behalf of Consolidated Lands for the purchase of this property?

A. I had something to do with it, surely. All the members of the group participated in the negotiations because they all had to be satisfied.

Q. Did Mrs. Rosebrook know that you were president of [112] Consolidated Lands?

A. I don't know whether she did or not.

Q. Had she not been present at meetings held by Consolidated Lands, or at least waiting for you, as she put it, I believe, outside the door?

A. Well, it's a matter of timing. At sometime, why, she learned that I was president of Consolidated Lands, and she might have known it from the inception, but I don't recall at what time she acquired the information.

Q. Now, at the time— Well, strike that. You did present the proposal to Mrs. Rosebrook on behalf of or

(Testimony of George W. Williams.)

concerning the sale this some 885 acres to Consolidated Lands, did you not? A. Yes, sir.

Q. At that time did she know that you were an owner and/or president of Consolidated Lands?

A. I am sure she did, yes, sir.

Q. Mr. Williams, how did the group arrive at the price that it asked for the property sold to Consolidated Lands?

A. Well, in connection with the determination of the price, I recall very definitely Mr. Wunderlich stating definitely that he would never sell a piece of property there for less than double what he paid for it. And in connection with dealing with a smaller piece of land, some of the rest of us at least had information as to the asking price of land in the area and [113] a price of \$2,000 an acre appeared to be right in line with the price being asked by adjoining land of comparable elevation and difficulty in handling.

Q. Mr. Williams, I show you Defendant's Exhibit B, a memorandum on which you have previously identified your initials. Would you read this sentence right here starting with "The development—"

Mr. Brenner: Your Honor, I am going to object to the reading into the record of anything in it, since I have already objected to the admission of the document itself.

The Court: All right, the objection will be overruled. Go ahead.

The Witness: "The development corporation will pay for said land an average of \$2,000 per acre, which sum may vary with the individual parcels, but which

(Testimony of George W. Williams.)

shall meet the average by the time all the property has been purchased."

Mr. Carico: Q. Mr. Williams, was any consideration given that statement at the time you set the \$2,-000 purchase price?

A. I can't understand what you are getting at. Of course there was consideration given to it. In a piece of property of this kind some of that land is absolutely waste land and some land is suitable for development, and so you look at the land and you consider what parts can be developed and which parts are waste land, and from your knowledge of the property, [114] why, then you come up with a price that can be paid for the entire parcel.

Certainly there was consideration given to that. That's an average price for the entire piece. Some of it even now will never be developed, can't be developed.

Q. Do you know what the cost was of the 885 acres that was sold to Consolidated Lands Company?

A. Well, as I recall, it was about, netting it out, around eleven hundred, eleven hundred and fifty dollars an acre, the cost to the individual.

Q. Mr. Williams, was one of the members of this tenant-in-common group American Homes Development Company of which we have previously spoken?

A. Yes, sir.

Q. You are a director of American Homes Development Company?

The Court: He has already testified to that.

Mr. Carico: Yes, that's correct, Your Honor.

Q. Mr. Williams, would you examine this document

(Testimony of George W. Williams.)

entitled Special Board of Directors Meetings of American Homes Development Company, January 27, 1954? Does your signature appear thereon?

A. Yes, sir, it appears on the waiver of notice.

Q. Would you review the contents of the minutes of that meeting just briefly? [115]

A. Well, the meeting was called to discuss the proposed sale of the American Homes Development Company's interest in the portion of the land in which it had an interest at San Bruno.

Mr. Brenner: Your Honor, I object to the reading of this, and I am going to object to the admission of it on the ground that any recitals therein are completely hearsay as to petitioner, and also that any intent that American Homes might have had is completely irrelevant.

The Court: I think we are getting a little far afield now, don't we?

Mr. Brenner: Any intent that American Homes might have had is completely irrelevant as to this plaintiff here.

Mr. Carico: Your Honor, on that point Mr. Williams, while it is true that this is a statement from the minutes of a Board of Directors' meeting of American Homes Development Company, Mr. Williams was a director, he was present. This purportedly represents the minutes of those meetings, and while it does represent the intent of American Homes Development Company, it must also represent Mr. Williams' intent because he was—

The Court: Objection sustained.

(Testimony of George W. Williams.)

Mr. Carico: May I have this marked for identification?

(Document entitled Special Board of Directors Meeting, American Homes Development Company, Jan. 27, 1954, was marked Defendant's Exhibit G for identification.) [116]

Mr. Carico: Your Honor, may I be heard on this last document?

The Court: Why don't you take it up, continue with some other subject, and take it up at some other time? Mark it for identification and you can reserve it.

Mr. Carico: All right. I have concluded my cross-examination.

The Court: All right. Do you want to discuss this document?

Mr. Carico: Your Honor, this document is the expression by one of the members of the group, which I think we have sufficiently established that it acted to a certain degree in concert now. It contains an expression that this sale to Consolidated Lands Company is in furtherance of the intent expressed by Plaintiff's Exhibit B, namely, the memorandum entered into just prior to the acquisition of the property. I think it is necessary to tie the whole thing together.

The Court: It may be. There is no use bringing into this case involving this type of sale something involving an interest of another person. We have admitted sufficient concerning what the trustee did or did not do. I think that's going far afield.

Mr. Brenner: Your Honor, so far as we can see,

(Testimony of George W. Williams.)

there is no concert shown other than the usual manner in which [117] tenants in common operate or concert with one another.

The Court: Pardon me for just a minute. What are you offering to prove? Tell me, counsel, what are you trying to show?

Mr. Carico: Your Honor, in this case we are dealing with, under the Government's position, a joint venture or partnership.

The Court: What are you trying to show by this document?

Mr. Carico: To show that this was the intent of the group at the time of acquisition of the property.

The Court: Sustain the objection. I think we have gone far enough.

Mr. Carico: It is in, then, for identification.

The Court: Are you finished with this witness?

Mr. Carico: I am finished with this witness.

The Court: Do you have any questions? We might finish up with this witness, if you have.

Redirect Examination

By Mr. Brenner:

Q. Mr. Williams, there was admitted into evidence Defendant's Exhibit B, purporting to set out the intent of the parties in acquiring this property. Was that the only intent that you had? [118]

A. No. As I recall that document, it was merely one course of action that might be followed. Certain contingencies arose with respect to the property. We had a number of courses of action outlined to us and it depended as to which we would follow largely on the

(Testimony of George W. Williams.)

basis of the income we could generate on the property being acquired.

The Navy lease was the key to the whole situation. If they continued to pay us a rental, we could hold the property for some time, which was our expectation. If the lease fizzled out, why, then we had to follow another course of action.

Q. Did the lease fizzle out?

A. Yes, sir, it did.

Q. What other considerations were involved there?

A. Well, we had made a commitment to the San Francisco bank on a relatively short-term note, and the condition of that loan was that the funds that we secured in connection with this Wherry Housing project combination and the sale of an elementary school site were to be applied to the loan; and while we sold the elementary school site on a condemnation, the Wherry Act folded and the Navy, in effect, decided to not pursue its lease any further and so we didn't have any income to carry on and meet our obligations. We had to consider other means of handling the property.

Q. Mr. Williams, Exhibit B will reveal that it is [119] entitled Memorandum, and that it bears certain initials, including your own. Is it your practice to initial contracts in your course of business?

A. Well, only as respect to corrections. With respect to contracts, we make many verbal contracts in the contracting business, and with respect to written contracts, why, we sign our name. In the use of initials, it indicates that we have read it and we know the contents of it, but we wouldn't ordinarily write a document and

(Testimony of George W. Williams.)

say, "This is a contract," and then try to make it a contract by signing our initials. That just—well, we wouldn't do anything of the kind.

Q. Did you consider this Exhibit B entitled "Memo" a contract?

A. No, sir, it was not a contract and it was never considered as such.

Q. I ask you to observe Exhibit B for a moment, Mr. Williams. Does this refer to the petitioner, Lois W. Rosebrook, by her present or former name?

A. No, she is not identified in any way with this document.

Q. Did she sign it?

A. No, sir. I don't believe she has ever seen it, as a matter of fact.

Q. Do her initials appear thereon?

A. No, sir.

Q. Do you remember the background against which this [120] memorandum was drawn?

A. Well, yes, I have had occasion to have my memory refreshed that I recall while we were negotiating on this property and prior to the final purchase, we were trying to determine how we would handle this property in the event it was secured, and how we would carry it as none of us wished to put in any additional funds after the initial investment, which was straining the resources of some, and there were various alternatives that were open to us. Now, at the time of the purchase, we thought the Wherry Housing Act would go through and we—

Q. Would you enlarge upon that, you thought the

(Testimony of George W. Williams.)

Wherry Housing Act would go through?

A. The Navy either had under condemnation or was about to file a condemnation and had actually had plans prepared, preliminary plans prepared for an apartment house project which would use 40 or 50 acres of this property, and we were expecting some compensation for that.

Further, in discussing this purchase with the Navy prior to our final signing, it was indicated that the Navy would expect to pay a reasonable value for the property after the termination of the lease, which was to be shortly after our acquisition, and we figured that the return from the lease and the return from the Wherry Housing Act would make it possible for us to carry this property for some time. [121]

Now, there were other possibilities involved. Other people were negotiating for this property. I had been advised confidentially that offers were in in excess of the amount that the property had been optioned to us at, and I advised the group that there was a very good possibility, if they wished to hold onto this property even for a comparatively limited period of time, that they might be able to sell it as a whole and realize a capital gain on their investment.

And other possibilities were that if we couldn't make any sale, that some interested parties in the group might wish to attempt some development of some of the property. And in connection with that, why, that memorandum was written.

The sole purpose of the memorandum, so far as I can determine, was to change the interest of Conway

(Testimony of George W. Williams.)

& Culligan in the company that would develop if that particular alternative came to pass.

Q. Change it in what way, Mr. Williams?

A. It would increase their percentage in the property from a sixth to a third.

Q. Was your interest to be changed by this memorandum?

A. Our interest was not affected in any way whatsoever by the memorandum.

Q. Do you have a copy of this memorandum, Mr. Williams?

A. No, sir, I do not.

Q. How many sales of real estate have you personally made, [122] say, in the last 40 years, Mr. Williams?

A. How many sales?

Q. Of real estate have you made in the last 40 years—personally, that is, as an individual?

A. Well, I doubt if I have made over ten in 40 years, and it may be less than that. That's a long time.

Q. Mr. Williams, are the underlying interests of the tenants in common in the land of the same amount or parallel to the shareholding interest in Consolidated Lands?

Mr. Carico: Your Honor, I fail to see the materiality. We are not urging capital contribution on the part of anyone at this time.

The Court: Go ahead.

The Witness: Would you repeat the question, please?

(Testimony of George W. Williams.)

Mr. Brenner: Q. Yes. The percentage ownerships of the underlying interests as tenants in common in the land set out in the documents at such and such a percent, do those same individuals hold exactly the same shareholding interests in Consolidated Lands?

A. Oh, no, absolutely not. The interests were quite different. As a matter of fact, there was a substantial interest in Consolidated Lands that was not in the other property whatsoever.

Q. Where there any interests in the property which were not shareholders in Consolidated Lands? [123]

A. Yes, there were; over twenty-two percent.

Q. Including the plaintiff herein?

A. The plaintiff had no—my daughter had no interest in Consolidated Lands whatsoever.

Mr. Brenner: Your Honor, that concludes my redirect examination.

The Court: All right.

Recross-Examination

By Mr. Carico:

Q. Mr. Williams, in referring to this memorandum of April 23, 1953, you stated that other courses of action had been contemplated. A. Yes, sir.

Q. Were any of those reduced to memorandum form?

A. No, they were not. There wasn't any need to, so far as I could determine.

Q. There was a need to reduce this plan of action to memorandum form?

A. Only on the part of Conway & Culligan, who

(Testimony of George W. Williams.)

wanted to be sure that if this course were followed their interest was changed.

Q. Now, you stated that the Navy lease fizzled out, as government leases sometimes do. When did this occur?

A. Well, I would presume that we had advice of that a few months after we secured the property, although we collected [124] on the lease, I guess, for some 20 months or so.

Q. Following the date you acquired the property?

A. Following the date, yes, sir.

Q. Now, with respect to this Wherry Housing activity that was contemplated, that is, in effect, a condemnation proceeding, isn't it, whereby the Government purchases your land?

A. The Government can condemn or it can negotiate, but you have to sell if they determine they want the property.

Q. And you were looking for a certain number of funds to help carry this property from what at that time you hoped would be a Wherry Housing condemnation or sale, is that correct? A. Yes, sir.

Q. Was this necessary because the property would not carry itself as an investment otherwise?

A. The property, the income from the rental of the bare land, like many farming properties, it won't pay the interest and taxes on it but still it is investment property from the standpoint of its potential. You are correct in your assumption that the property would not carry itself unless the Navy lease continued in existence.

(Testimony of George W. Williams.)

Q. You stated again with reference to this Defendant's Exhibit B, the memo of the San Bruno land, that it does not refer to the petitioner. Does it refer to you as representing the trust for the petitioner?

A. I don't know that it refers to me in that regard. [125]

The Court: Isn't it clear on its face? Can't we look at it?

Mr. Carico: Yes.

The Court: He doesn't have to tell us that.

The Witness: I notice on here, and I—like you say, I don't recall this memorandum too well, but it appears that "trust for children" has been crossed out here. I don't know when it was done or why it was done.

The Court: Are you going to be very much longer with this witness?

Mr. Carico: I think I have about one question more, if I can decipher my notes here, Your Honor.

The Court: That's fine.

Mr. Carico: Q. Mr. Williams, in the light of your next to last statement concerning this property, is it not true that the land that was sold to Consolidated Lands in February of 1954 was not suitable for long-term investment property?

A. Oh, I wouldn't say that. I would say that it had very good potential as a long-term investment. The only trouble with the land was that it had no income possibilities, and to buy it for investment, you had to have some other income to pay the taxes and to

(Testimony of George W. Williams.)

carry that land to realize the appreciation which I thought would occur in the next two or three years.

The Court: Is that your question?

Mr. Carico: That is it, Your Honor. [126]

Mr. Brenner: Your Honor, may I have one more question?

The Court: Yes.

Mr. Brenner: Mr. Williams, when did you first learn that the Wherry Housing project which you had counted on to supply income to carry the land had fallen through?

The Witness: Oh, I can't answer that exactly, but that was almost immediately after the acquisition, as I recall. The thing just folded. The Navy changed its entire policy at about that time and we were left sort of high and dry.

Mr. Brenner: Your Honor, I have no further questions, but at this time I would like to make a motion to submit to the Court a memorandum of points and authorities which Your Honor might like to take under submission.

The Court: All right, with respect to what?

Mr. Brenner: I would like to make a motion to strike Defendant's Exhibit B and just submit a memorandum of points and authorities on the subject.

The Court: You may do that, certainly.

Mr. Carico: Your Honor, I am afraid I do have one further question here.

Q. Mr. Williams, you stated that you were not—or that this property was suitable for long-term investment property.

(Testimony of George W. Williams.)

Mr. Carico: Your Honor, with respect to Defendant's Exhibit G, which we have gone over before, this is the minutes [127] of the Board of Directors' meeting at which Mr. Williams was present.

The Court: We will take it up tomorrow morning, if you wish.

Mr. Carico: It states in here, Your Honor, that the property being sold is "mainly suitable for residential development and not long-term investment." It is directly contrary to his previous testimony.

The Court: Well, that's your statement.

Mr. Carico: May we offer it for the purpose of impeachment, limited to that?

The Court: There is no foundation for that. Is his signature on that?

Mr. Carico: He has examined it and said it is the minutes—this was examined previously, all right.

The Court: All right, you can re-present it tomorrow morning. We will take a recess until tomorrow morning at 10:00 o'clock.

(Adjournment taken to Wednesday, August 24, 1960, at 10:00 o'clock a.m.) [128]

Morning Session, Wednesday, August 24, 1960—10:00 o'clock A.M.

The Clerk: Charles and Lois Rosebrook versus the United States of America, for further trial.

Mr. Brenner: Your Honor, I think when we concluded yesterday, Mr. Williams was still on the stand.

The Court: I thought we had finished with him.

Mr. Brenner: I believe counsel was going to submit one more thing which maybe was pertinent to Mr. Williams.

Mr. Carico: There was some question, Your Honor, as to whether Mr. Williams had signed the minutes of the meeting of the American Home Development Company and was present at that meeting. I believe I had already laid the foundation.

The Court: Do you want the witness any further?

Mr. Carico: Yes, I do, if Mr. Brenner seriously has a question. I know he did object on the ground of foundation.

The Court: Pardon me. Do you want the witness present?

Mr. Carico: Yes.

The Court: I was under the impression you had finished with him. In fact, I kept court in session so you would finish with him. If you want him, call him back.

Mr. Carico: Mr. Brenner, is there any real problem about the foundation, because that's the only thing I want.

Mr. Brenner: Your Honor, I would have no objection [129] to him calling him back as long as I can rebut or cross-examine on anything that is brought out.

Mr. Carico: He is your witness, counsel.

The Court: I wish you would make up your mind.

Mr. Brenner: I have finished with him otherwise.

The Court: Are you?

Mr. Carico: I was finished with him until the objection was raised, Your Honor.

(Testimony of George W. Williams.)

The Court: That doesn't answer the question. Are you finished with him or not?

Mr. Carico: I am not finished with him.

The Court: All right, call him up and ask him what you want.

GEORGE W. WILLIAMS,

called as a witness by the plaintiffs, being previously sworn, resumed the stand and testified further as follows:

Recross-Examination (Continued)

By Mr. Carico:

Q. Mr. Williams, you previously testified that you were a director of American Home Development Company, is that correct? A. Yes, sir.

Q. Were you present at a Directors' meeting on January 27, 1954, at which time the proposed sale of this property to Consolidated Lands Company was discussed?

Mr. Brenner: Your Honor, I am going to object here [130] because I will be objecting to the minutes of the American Home Development Company, and I believe my objection was sustained yesterday so any question in regard to those minutes would also be irrelevant and immaterial with relation to this petitioner at this time.

Mr. Carico: Your Honor, at this time, subject to my questioning, I intend to offer this for the purpose of impeachment. This contains the statements and discussions of the Directors, one of whom was Mr. Williams. It states specifically—

(Testimony of George W. Williams.)

The Court: Are you trying to elicit through these documents something which you claim to be at variance with his testimony?

Mr. Carico: Very definitely, Your Honor.

The Court: Then proceed for that purpose.

Mr. Carico: Q. You may answer the question.

A. I don't recall the date of the meeting, but I was present at a meeting at which that matter was discussed.

Q. Mr. Williams, I direct your attention to Defendant's Exhibit G. Does your signature appear thereon?

A. Yes, sir.

Q. Is that, to the best of your knowledge, the minutes of the meeting of the American Home Development Company at which time this proposed sale to Consolidated Lands was discussed?

A. Yes, sir. [131]

Q. In reviewing that, does that accurately summarize what was discussed between yourself, Mr. Burrows and Mr. Williams, Jr. at that meeting?

A. Yes, sir.

Mr. Carico: Your Honor, I offer Defendant's Exhibit G at this time for the purpose of impeachment.

Mr. Brenner: I will object, Your Honor. There has been no foundation laid for what statements in this are contrary to statements made on the stand.

The Court: Will you please indicate what you claim is contrary to the testimony?

Mr. Carico: Yesterday, Your Honor, Mr. Williams testified that this property that was sold was suitable for a long-term investment. The last sentence on page

(Testimony of George W. Williams.)

I summarizing the discussions between Mr. Williams, Mr. Burrows and another man at the Directors' meeting states that, "The property being sold is mainly suitable for residential development and not long-term investment."

Furthermore, he also testified that this sale was not pursuant to any previous arrangement or plan. However, this same set of minutes also contains the statement, "This sale will accomplish the company's objective when it made the acquisition of all the property; that is, it will only own property which is suitable for investment for the development of commercial establishments on a lease basis," which is at variance [132] with his statement that this was not anything that had been contemplated earlier. Mr. Williams at all times, as I brought out yesterday afternoon, had been a director and officer of American Homes.

The Court: I don't think there is any reason why it shouldn't be admitted for the limited purpose of what effect it may have on the witness' testimony. However, it will not be considered substantive evidence as to what—

Mr. Brenner: May I be heard on this, Your Honor? May I be heard on this? Mr. Williams testified as to what his intent in holding the property was and his purpose for holding the property for long-term investment was. This is a different taxpayer, and what is long-term—

The Court: Pardon me. It is being offered only insofar as the witness has tended to say that it reflects what he discussed with others at this meeting.

(Testimony of George W. Williams.)

Mr. Brenner: I don't think it impeaches him, Your Honor.

The Court: Well, maybe you don't and maybe it doesn't. However, it will be admitted for the limited purpose of what effect, if any, it has on the testimony of the witness. And as you know, an admission for that purpose does not make it competent to support any fact.

Mr. Carico: Your Honor, I might point out one further thing. At the conclusion of the trial, I also intend to offer [133] that, subject to Your Honor's finding that this was a joint venture, which we feel we have proved, as the statement of another joint venturer.

The Court: Then you can re-offer it for another purpose at that time.

Mr. Carico: Right. That will be done at the conclusion of the trial.

That is all the questions I have of the witness.

Mr. Brenner: This having come in, may I ask three more questions?

The Court: Yes.

The Clerk: Defendant's Exhibit G in evidence.

(Whereupon Defendant's Exhibit G for identification was received in evidence, for limited purpose noted.)

Further Redirect Examination

By Mr. Brenner:

Q. Mr. Williams, what would be a good long-term investment for you and for other tenants in common?

(Testimony of George W. Williams.)

Would that necessarily be a good long-term investment for some other holder of an undivided interest in the property?

A. Well, a long-term investment that is good for one party might be very injurious to another party.

Q. Would you expand upon that a little, please?

A. Well, for instance, one party might buy a vacant piece of land expecting to hold it for appreciation, and he would be [134] able to take care of the carrying charges and the taxes out of other income, whereas another investor might buy the same piece of land but not have the other income to carry it, and in that event it would be a burden and eventually foreclosed on him.

So for one party it would be a very poor investment and for another party it might be a satisfactory investment. It depends on the objective and the financial condition of the party. This American Home Development Corporation, that corporation had different objectives, for instance, than I personally had in connection with the property.

Q. If American Homes or any other tenant in common had insisted on a different time table in regard to the property, or a different course of action than you did, what would you do in that regard, Mr. Williams?

Mr. Carico: Objection, Your Honor. That is purely a hypothetical question.

The Court: Yes, that is too speculative. He can explain that statement, which he has done.

Mr. Brenner: Q. Mr. Williams, these minutes purport to set out a course of action for American Homes

(Testimony of George W. Williams.)

Development Company. If that did not meet with your personal objective, what would you do in this regard?

Mr. Carico: Objection.

The Court: I don't understand this, frankly. I haven't read that. [135]

Mr. Brenner: The minutes here purport to set out a course of action which seems to the defendant to be binding upon other people in this trial. I want to establish the fact that these minutes and the course of action which American Homes had planned is in no way binding upon the other tenants in common who were owners of this property.

The Court: It's too much for me. Read it again.

(Statement by Mr. Brenner read by the reporter.)

The Court: There is nothing there for me to rule on.

Mr. Carico: May I point out that the—

The Court: You don't have to point out anything. It is just a statement by counsel.

Mr. Brenner: Why, I attempted to phrase it in question form.

The Court: Well, I don't get the question. Rephrase it.

Mr. Brenner: Let me try to rephrase it.

Q. Mr. Williams, did you, as an individual, consider yourself bound by what American Homes stated its course of action and intended purpose was in these minutes?

A. No, sir.

Mr. Carico: Objection, Your Honor.

Mr. Brenner: Q. If there had been a variance be-

(Testimony of George W. Williams.)

tween your intent and purposes, what would you have done—

Mr. Carico: Objection. [136]

Mr. Brenner: Q. —in this regard?

Mr. Carico: It is a hypothetical question.

The Court: Sustained. That is purely speculative. That is not testimony at all.

Mr. Brenner: I have no further questions.

Mr. Carico: I have no further questions, Your Honor.

(Witness excused.)

Mr. Brenner: Your Honor, that closes the plaintiffs' direct case, unless I might recall the plaintiff, Lois W. Rosebrook, for one question.

The Court: All right.

LOIS W. ROSEBROOK,

a plaintiff herein, recalled as a witness in her own behalf, being previously sworn, testified further as follows:

Direct Examination

By Mr. Brenner:

Q. Mrs. Rosebrook, in the period encompassed by the time from May of 1953 to February of 1954, were you acquainted with Mr. Culligan, Mr. Conway or Mr. Wunderlich? A. No, I was not.

Q. Had you ever met them? A. No.

Q. Or ever talked business with them in any regard? A. No.

Mr. Brenner: I have no further questions. [137]

Mr. Carico: I have no questions.

(Witness excused.)

Mr. Brenner: That concludes the plaintiffs' case, Your Honor.

The Court: I believe you made a motion to strike—

Mr. Carico: Yes, I did, Your Honor.

The Court: —the so-called memorandum dated April 23, which is Exhibit what?

Mr. Brenner: "D," Your Honor. In evidence now.

The Court: Defendant's Exhibit D in evidence. The defendant's theory here is that there was a joint venture and that the plaintiff herein was part of it. I am not prepared to state that the record is void entirely of evidence tending to support such an inference, and for that reason the exhibit in question has been admitted in evidence. I am not indicating, however, that I believe the evidence to be sufficient to support a finding that she was part of any joint venture. I am merely pointing this out to show the theory or relevancy upon which the document is admitted, namely, the possible existence of a joint venture or possible agency for this lady on the part of her father. If the Court does not find that there was a joint venture as far as this plaintiff is concerned, that evidence will, of course, be disregarded and ordered stricken from the record.

Mr. Brenner: Your Honor, is my memorandum of points [138] and authorities a part of the record?

The Court: It is.

Mr. Brenner: Thank you, Your Honor.

The Court: In those cases which you cited the evidence was obviously hearsay and incompetent. I am pointing out to you the theory on which it has been admitted in this particular case before us without, I repeat, indicating that the evidence is sufficient to sup-

(Testimony of Frank A. Burrows.)

port any such finding at all. However, if there is any such evidence in the record to support a finding, evidence like this at least becomes relevant to the issue.

Mr. Carico: Do you want anything on that from the defendant in the final brief filed, Your Honor?

(No audible response.)

Mr. Carico: At this time I would like to call Mr. Frank Burrows.

FRANK A. BURROWS,

called as a witness for the defendant, being first duly sworn, testified as follows:

The Clerk: State your name and occupation for the record.

The Witness: My name is Frank A. Burrows, B-u-r-r-o-w-s, President of Williams & Burrows, General Contractors. [139]

Direct Examination

By Mr. Carico:

Q. Mr. Burrows, you also own an interest in Williams & Burrows, is that correct? A. Yes.

Q. Do you also own an interest in George W. Williams Company?

A. I think you mean G. W. Williams Company.

Q. G. W. Williams Company; I am sorry.

A. Yes, I own stock.

Q. Are you an officer of that company?

A. Yes.

Q. A director of that company? A. Yes.

(Testimony of Frank A. Burrows.)

Q. What type of business was the G. W. Williams Company in in 1953?

Mr. Brenner: Objection, Your Honor. Immaterial to this plaintiff.

Mr. Carico: Your Honor, this question—

The Court: I didn't even hear the question. What was it?

Mr. Carico: The type of business the G. W. Williams Company was in in 1953. It comes in, as Your Honor has stated, where we have made out, I feel, more than a prima facie case. [140]

The Court: I see no objection to it.

Mr. Brenner: Your Honor, G. W. Williams Company wasn't even an owner of an interest in this land. There is no connection or foundation laid whatever.

The Court: What was the name of the father's company?

Mr. Carico: G. W. Williams Company.

Mr. Brenner: But the G. W. Williams Company was not a tenant in common in this land.

The Court: That was the name of the father's business?

Mr. Brenner: Yes.

The Court: There is already some testimony in as to what the business was. Overruled.

Mr. Carico: Q. You may answer the question.

A. The business of G. W. Williams Company is principally in the ownership and development of investment properties.

Q. In 1953 was this true?

A. Yes, it has been—that company has moved in

(Testimony of Frank A. Burrows.)

that direction for the past several years and I think it would include 1953.

Q. Moved in that direction from the home building business originally?

A. Well, originally, prior to the war, the company was in a contracting, construction and home-building business.

Q. Let me clarify that. Let me say for five years prior to 1953? [141]

A. Immediately after the war, in those years the company—well, that company was moving out of the home-building field.

Q. Mr. Burrows, did you join together with Mr. Wunderlich, Mr. Andrew Conway, Mr. George Williams and other groups in corporations which they were representing in purchasing the stock of the San Bruno Land Company in 1953? A. Yes.

Q. And you later took title to a percentage of that land as a tenant in common? A. Yes.

Q. Did you sell your interest in 885 acres of that land to Consolidated Lands Company in February of 1954?

A. I think that was about the time, and I think that was approximately the acreage.

Mr. Carico: May I have Defendant's Exhibit B?

Q. Mr. Burrows, I show you Defendant's Exhibit B, which purports to be a copy of a memorandum entitled "Re San Bruno Lands, Incorporated," dated April 23, 1953. Will you tell me if you identify your initials on pages 1 and 2 thereof?

A. Yes, those are my initials.

(Testimony of Frank A. Burrows.)

The Court: Is this Exhibit D?

Mr. Carico: Exhibit B, Your Honor—"B" for "Baker." It is that disputed memorandum.

I have no further questions at this time, Your Honor.
[142]

Cross-Examination

By Mr. Brenner:

Q. Mr. Burrows, do your duties as an officer and director of the G. W. Williams Company and Williams & Burrows primarily concern themselves with real estate?

A. My duties—I will have to split it. My duties with regard to the Williams & Burrows are construction operations. With respect to the Williams Company, those duties as a director are largely in connection with investment properties, development of the same.

Q. What percentage of your time would you allocate to each activity?

A. About 90 percent to Williams & Burrows, 10 percent to the real estate development company.

Q. Would that mean, then, 90 percent to construction and 10 percent to investment real estate activities?

A. Yes.

Q. Mr. Burrows, you were shown the Defendant's Exhibit B and identified your initials thereon. I now show you Defendant's Exhibit B again. Would you tell us if that was the only course of action contemplated by the people who initialed that memorandum?

A. As I recall it—

(Testimony of Frank A. Burrows.)

Mr. Carico: (Interposing.) Your Honor, he may testify to what he may have intended and discussed, but not [143] what other people may have intended.

The Court: He is asking him that.

Mr. Brenner: Q. Was that the only course of action which you personally contemplated in regard to that memorandum when you initialed it?

A. No, that memorandum was prepared on the eve of the purchase of this large piece of land. It was a large undertaking. As far as I was concerned, it was a question of analyzing what might be the prospects and possibilities. The option on the land provided for what appeared to be a very, very reasonable price. The land was partially in farm products and flowers, a large piece was occupied by the Navy, and there were strong discussions with the Navy at the time with respect to a Wherry Act housing project to be built on a piece of this property. From an investment standpoint, it looked like one of those things where you were bound to be able to invest your money and come out with a profit.

The various possibilities of what to do with the land, of course, were numerous. As tenants in common each could partition and take his share. The Navy had not been paying rent under the old arrangement, but was faced with a new arrangement whereby it would either pay fair rental for the property or would condemn the property.

Mr. Carico: Your Honor, if I may interject, this surely is not responsive to the question, "Were any other [144] arrangements contemplated?" I would

(Testimony of Frank A. Burrows.)

like to reserve the right to impeach this witness.

The Court: Go ahead.

Mr. Brenner: Q. Go ahead, Mr. Burrows.

A. Another possibility was further development of the farm land and increase in rentals, which were at the time very nominal. In the path of progress and as a holding for I don't care how long, it certainly looked like it had tremendous advantages to anyone investing in the piece.

This memorandum covered one possible course of action, of which there were these—well, of which there were numerous others, two or three of which I have touched upon.

Q. Do you ever, in your business practice, intend to execute a contract by initialing it?

A. Well, in practice many of our arrangements, particularly in the construction business, are even done verbally. By initialing a memorandum or a bid, whatever the case may be, you have the means of identification and the means of serving memory in the event some time has elapsed. I have no—I would presume that if we followed the course of action as outlined here, that this indicated what each of the parties would do, if that course of action were followed.

Q. Do you know at whose suggestion this memorandum, which is Exhibit B, was drawn up?

A. Yes, I do. In trying to work out this group of [145] investors, Conway & Culligan had the smallest share. If this course were followed—

Mr. Carico: Objection. This is not responsive to counsel's question of asking who suggested it be drawn up. The answer is Conway & Culligan.

(Testimony of Frank A. Burrows.)

Mr. Brenner: He can answer more than two words, Your Honor. This is part of his answer.

Mr. Carico: It is also outside the scope of my direct examination. All I asked him was if those were his initials.

The Court: Overruled. Go ahead.

Mr. Brenner: Q. You may answer.

A. Conway & Culligan, in the purchase, had the lesser share than the other groups. If this course of action were adopted, they felt they could foresee that they would be called upon for more activity, more work, than if they held it purely as an investment. Then in that event they wanted to be able to participate equally with the other groups. That's what this memorandum, I think, purports to set up.

Q. Did this memorandum concern you in any way, in your opinion?

A. (No audible response.)

Q. Let me rephrase it. Did it concern your percentage participation in any way?

A. Yes, my percentages are—well, in the over-all, the [146] Williams & Burrows group's percentage was not changed by the memorandum.

Q. Do you have a copy of this memorandum?

A. I don't know, but I might well have.

Q. In the period encompassed from May of 1953 to February of 1954, did you know the plaintiff herein, Lois W. Rosebrook?

A. Yes.

Q. Have you ever talked business with her?

A. No.

(Testimony of Frank A. Burrows.)

Mr. Brenner: I have no further questions, Your Honor.

Redirect Examination

By Mr. Carico:

Q. Mr. Burrows, were any other memorandums prepared as a result of your meeting?

A. I don't know.

Q. Was this memorandum not prepared by a Mr. Depaoli, an attorney?

A. Mr. Depaoli? Not that I know of.

Q. Do you know who did prepare it?

A. It was probably prepared by Mr. Crane, but I don't know. The purpose of preparing it—

Q. I understand.

A. (Continuing.) This had to do with a change in the relationship of the parties involved.

Mr. Carico: I move to strike that as a volunteered statement. [147]

The Court: Strike it out. Go ahead, please.

Mr. Carico: Q. You are an attorney, also, are you not, Mr. Burrows?

A. I am a member of the bar, yes.

Q. You mentioned something with respect to a contemplated Wherry Housing deal. A Wherry Housing condemnation is, in fact, a sale, is it not?

A. A Wherry?

Q. Yes. A Wherry Housing deal. That would, in fact, constitute a condemnation sale? A. Yes.

Q. So you were anticipating receiving money from the sale of the property and not anything generated as income from the property, is that not correct?

(Testimony of Frank A. Burrows.)

A. Well, there is a possibility of a Wherry Act condemnation.

Q. And that would generate money by a sale rather than income as you normally think of rents and profits from the land, is that correct?

A. That is correct.

Mr. Brenner: I have no further questions.

(Witness excused.)

Mr. Carico: Your Honor, I call Thomas J. Culligan, Jr., under Rule 43(b). [148]

The Court: What is Rule 43(b)?

Mr. Carico: As an adverse and hostile witness. As Your Honor saw from Mr. Burrows, Mr. Culligan, Mr. Burrows, Mr. Williams, are all involved in this transaction. They either have now or have had a problem with the Internal Revenue Service on this same sale in question. I think Your Honor is well aware, from my one question as to the initial on this Exhibit B, counsel turned Mr. Burrows on, brought in things and, in effect, made him his own witness, and under the circumstances, I think it would be manifestly unfair for the Government to be bound by their testimony.

The Court: All right, proceed.

THOMAS J. CULLIGAN, JR.,

called as an adverse witness by the Government under Rule 43(b), being first duly sworn, testified as follows:

Mr. Brenner: First of all, Your Honor, may I be heard on this Rule 43(b)?

The Court: No. Go right ahead. If it comes up, I will rule on it.

(Testimony of Thomas J. Culligan, Jr.)

The Clerk: Please state your name and occupation for the record.

The Witness: My name is Thomas J. Culligan, Jr., executive officer of various corporations. [149]

Direct Examination

By Mr. Carico:

Q. Mr. Culligan, do you presently maintain an office in the Peninsula where you hold out yourself to be a builder, developer and general contractor to the general public?

Mr. Brenner: Your Honor, I am going to object to this question as leading. I have no knowledge that this witness is a hostile witness.

The Court: Neither have I. Go ahead. Sustained. Reframe the question.

Mr. Carico: Q. Mr. Culligan, you are aware, are you not, that this case involves the sale of an interest in the old San Bruno Lands to Consolidated Lands Company?

A. Well, in the subpoena it didn't say what I was coming here for.

Q. In February of 1954 you did sell an interest in such lands to the Consolidated Lands Company?

A. My interest, you mean?

Q. Your interest, yes.

A. Yes.

Q. Do you presently have a case pending in the Appellate Division of the Internal Revenue Service involving whether that sale constituted capital gain or ordinary income?

(Testimony of Thomas J. Culligan, Jr.)

A. Not to my knowledge. It might be. I really don't know. I turn these matters over to my attorney. [150]

Q. Your attorneys have not discussed any such pending discussion with you?

A. No, I haven't discussed it.

Q. Mr. Culligan, your attorney is Max Weingarten, is he not? A. Correct.

Q. Were you not present when Mr. Weingarten, before Mr. Lyons, the Appellate Section, involving this particular transaction I just asked you about, approximately two months ago—

A. Would you please mention the question again? I couldn't follow you.

Q. Were you and Mr. Weingarten before Mr. Lyons of the Appellate Section of the Internal Revenue Section approximately two months ago concerning the sale of your interest and the treatment of the gains from the sale of your interest in the San Bruno Lands to Consolidated Lands Company?

A. No, I have never appeared with Mr. Weingarten in any matter.

The Court: Can't we proceed with the examination of the witness? If he proves to be unwilling or hostile to you, I will deal with the situation.

Mr. Carico: All right, Your Honor.

The Court: Go ahead.

Mr. Carico: Q. Mr. Culligan, you mentioned that you are an executive of various corporations. Do you own an interest in Conway & Culligan Development Company? [151]

A. No more.

(Testimony of Thomas J. Culligan, Jr.)

Q. Did you in 1953 and 1954?

A. That was just about the year that the corporation was dissolved. I don't know the exact date.

Q. And Conway & Culligan Development Company bought land, subdivided it and sold it prior to—

A. (Interposing.) It was a corporation.

Mr. Brenner: Objected to, Your Honor. This is immaterial and irrelevant as to this plaintiff.

The Court: I just suggested he get along and question him and go ahead, and I presume he is doing so.

Mr. Carico: It comes in the same as it has on the others, Your Honor.

Mr. Brenner: Your Honor, what Conway & Culligan did has no—

The Court: I don't know yet. I am just listening. Go ahead, counsel.

Mr. Carico: Q. Did you also at one time own an interest in Hillcrest Gardens, Incorporated?

A. Hillcrest Gardens? Yes. It was a corporation set up for the purpose of building homes.

Q. And selling them?

A. And selling homes, yes.

Q. What about Rawlston Construction Company?

A. Rawlston was a corporation set up for the purpose of [152] constructing homes.

Q. In that connection or in connection with all of these previous corporations, did your activities constitute examining land before purchasing and supervising the development thereof?

Mr. Brenner: I will object, Your Honor. We are getting immateriality upon immateriality now.

(Testimony of Thomas J. Culligan, Jr.)

The Court: He has already testified that they were in the business of subdividing and home building. I don't know what he wants now. Go ahead.

Mr. Carico: Q. Did your activities in connection with these various corporations encompass examining and purchase of lands and the supervision and development thereof?

A. As an officer of the corporations, yes.

Q. And you were, I believe, involved in the original purchase of the San Bruno Lands Company sometime in May of 1953.

A. That was the original purchase?

Q. Yes. A. Yes.

Q. Do you have a real estate license, Mr. Culligan?

A. Yes, sir.

Q. Do you know a Mr. Andrew Conway?

A. Andrew Conway? Yes, I do.

Q. Do you know of your own personal knowledge if Mr. Conway was involved in the acquisition of the San Bruno Lands?

A. I believe he was, yes. [153]

Q. Do you know of your own personal knowledge if Mr. Conway sold his interest in a portion of such land to Consolidated Lands Company in 1954?

Mr. Brenner: Your Honor, I have to record my objection here. I don't see that it hurts us, but it is completely irrelevant.

The Court: Well, then why worry about it? Overruled. It's in already.

Mr. Carico: The problem, Your Honor, is that Mr. Conway is out of the state on vacation or we would have called him.

(Testimony of Thomas J. Culligan, Jr.)

The Court: There's no problem. It will be purely cumulative, I assume.

Mr. Carico: Yes, it would.

The Witness: Yes, he did.

Q. Do you know of your own personal knowledge if Mr. Conway owned an interest in Conway & Culligan Development Company in 1953?

A. The original corporation?

Q. Yes. A. Yes.

Mr. Carico: I have no further questions.

Mr. Brenner: I have no questions whatever, Your Honor.

The Court: What is the significance of this testimony? [154]

Mr. Carico: Your Honor, this comes into one of the tests that is normally set up of circumstantial evidence indicating their intent. If these men either on their own behalf or the partnership or corporation are interested in development of land—

The Court: You are establishing now that Conway & Culligan were in the business of acquiring lands for subdivision and the construction and sale of lots, is that right?

Mr. Carico: Yes, and that these men were principal stockholders, officers and directors and were involved in the real estate business primarily.

The Court: I imagine that could have been stipulated to, if you asked for it.

Mr. Carico: Counsel has refused to stipulate.

The Court: Do they claim that they are not engaged in the buying and selling of property in the ordinary course of business?

(Testimony of Thomas J. Culligan, Jr.)

Mr. Carico: He considers it irrelevant. It is an opinion he is entitled to. We have an opposite opinion.

The Court: Who is "he"?

Mr. Carico: Mr. Brenner.

The Court: All right, that's enough. Thank you very much.

(Witness excused.)

Mr. Carico: Your Honor, the defense's case is closed. [155]

The Court: All right, anything further?

Mr. Brenner: Does Your Honor desire oral closing arguments?

The Court: Yes, I would like to hear from you and see if you can pull this thing together.

Mr. Carico: I am sorry, Your Honor, I over-anticipated myself. As I stated to Your Honor a few minutes ago with reference to Defendant's Exhibit G, which is the minutes of the special meeting of the board of directors—

The Court: Yes, I understand. What do you want to do about it?

Mr. Carico: I wish to offer this exhibit as substantive evidence at this time, Your Honor, contingent upon Your Honor's finding that this was a joint venture, as the statement of one joint venturer, which, under the hearsay rule or any rule of evidence, is admissible as against any other joint venturer, both on behalf of the individuals who made the statement and on behalf of American Home Development Company, which itself is a member of the joint venture.

The Court: All right, the offer to introduce it in evidence is submitted. I presume you object to it?

Mr. Brenner: May I record my objection?

The Court: Your objection will be noted.

Mr. Brenner: It is on the basis that no foundation has been laid yet for the establishment— [156]

The Court: I understand, and your objection will be noted and it will stand submitted.

All right, suppose we take a five-minute recess and then we will see what you have to offer.

(Short recess.) [157]

* * * * *

[Endorsed]: Filed Sept. 29, 1960

[Endorsed]: No. 17387. United States Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Charles E. and Lois Rosebrook, Appellees. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed and Docketed: May 26, 1961.

/s/ FRANK H. SCHMID,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 17387

UNITED STATES OF AMERICA,

Appellant,

vs.

CHARLES E. ROSEBROOK and LOIS ROSE-
BROOK,

Appellees.

DESIGNATION OF RECORD

The Appellant, United States of America, designates the following portions of the record on appeal to be printed:

1. Complaint filed December 18, 1959.
2. Answer filed February 11, 1960.
3. Partial Stipulation of Facts filed August 23, 1960, (a copy of which was also introduced in evidence by the plaintiffs) with the exception of the exhibits thereto which are to be excluded by stipulation and order of the Court.
4. Page 37, line 10, through Page 157, line 5, inclusive, of the reporter's Transcript of Proceedings of Trial filed September 29, 1960.
5. Memorandum and Opinion filed October 19, 1960.
6. Findings of Fact and Conclusions of Law filed January 3, 1961.
7. Judgment for Plaintiffs on Findings of Court filed January 3, 1961.
8. Notice of Appeal filed March 2, 1961.

9. Designation of Contents of Record on Appeal filed March 2, 1961.

10. Order Extending Time to file record and docket appeal filed April 7, 1961.

11. Statement of Points on Appeal filed contemporaneously herewith.

12. Stipulation re printing of exhibits filed contemporaneously herewith and any Order based thereon.

13. This Designation of Record.

Dated: June 12, 1961.

LAURENCE E. DAYTON

United States Attorney,

RICHARD L. CARICO,

Assistant United States Attorney,

/s/ By RICHARD L. CARICO.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed June 12, 1961. Frank H. Schmid,
Clerk.

[Title of Court of Appeals and Cause.]

STATEMENT OF POINTS ON APPEAL

The Appellant, United States of America, hereby adopts the following as its concise statement of points which will be relied upon on appeal:

1. The District Court erred in holding that the Appellee, Lois Rosebrook, was not a dealer in real property.

2. The District Court erred in holding that the Appellee, Lois Rosebrook, did not hold her interest in 884.2 acres of land located in San Bruno, California,

primarily for sale to customers in the ordinary course of a trade or business.

3. The District Court erred in holding that the interest of the Appellee, Lois Rosebrook, in 884.2 acres of land located in San Bruno, California, was a capital asset as defined in Section 1221 of the Internal Revenue Code of 1954 (68A Stat. 321).

4. The District Court erred in holding that the Appellee, Lois Rosebrook, properly reported gain realized upon sale of her interest in 884.2 acres of land in San Bruno, California, as capital gain.

Dated: June 12, 1961.

LAURENCE E. DAYTON,

United States Attorney,

RICHARD L. CARICO,

Assistant United States Attorney,

Attorneys for Appellant,

/s/ By RICHARD L. CARICO.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed June 12, 1961. Frank H. Schmid,
Clerk.

—

[Title of Court of Appeals and Cause.]

STIPULATION

It is stipulated that all exhibits introduced at the time of trial of the captioned case, including those introduced as a part of the Partial Stipulation of Facts, may be considered in their original form without printing, provided, however, that counsel for the respective parties

may print such portions of the exhibits as they consider pertinent in appendix to the briefs.

Dated: June 12, 1961.

LAURENCE E. DAYTON,
United States Attorney,
RICHARD L. CARICO,
Assistant U. S. Attorney,
/s/ By RICHARD L. CARICO,
EUGENE J. BRENNER,
HARRY L. FREEMAN,
JANIN & MORGAN,
Attorneys for Appellees.
/s/ By EUGENE J. BRENNER,

So ordered:

/s/ RICHARD H. CHAMBERS,
Circuit Judge.

June 12, 1961.

[Endorsed]: Lodged June 12, 1961. Filed June 13,
1961. Frank H. Schmid, Clerk.

No. 17389

IN THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

STEPHEN R. BENCHWICK,)
)
 Appellant,)
)
 vs.)
)
UNITED STATES OF AMERICA,)
)
 Appellee.)
)
)

On Appeal from the District Court of the
United States for the District of Hawaii

BRIEF FOR APPELLANT

Of Counsel

CRUMPACKER & STERRY

E. D. CRUMPACKER
300 Capital Investment Bldg.
Honolulu, Hawaii

Attorney for Appellant

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No. 17389

IN THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

STEPHEN R. BENCHWICK,)
)
Appellant,)
)
vs.)
)
UNITED STATES OF AMERICA,)
)
Appellee.)
)

On Appeal from the District Court of the
United States for the District of Hawaii

BRIEF FOR APPELLANT

JURISDICTION

The District Court had jurisdiction at the trial of this case under 18 U.S.C. § 3231 and Rule 18, Federal Rules of Criminal Procedure. After conviction, jury waived, a timely appeal was taken, and the jurisdiction of this Court to review the judgment of the District Court is invoked under 28 U.S.C. §§ 1291 and 1294.

STATEMENT OF THE CASE

On January 27, 1961, after the execution and filing of a Waiver of Indictment (R-2) by the Appellant, an Information containing 13 counts was filed against Appellant in the United States District Court for the District of Hawaii under 18 U.S.C. §§ 2 and 656 charging him with knowingly, wilfully and feloniously, and with intent to injure and defraud an insured bank, aiding, abetting, counselling, inducing and procuring William Moss Vannatta, an officer, agent and employee of said insured bank, namely, Manager, Aiea Branch, Bank of Hawaii, Aiea, Oahu, in the District of Hawaii, to, and the said Vannatta did, then and there wilfully misapply, for the use and benefit of the Appellant, certain of the moneys, funds and credits of said insured bank, said Vannatta having the intent to defraud and to injure said bank, in that the Appellant did draw and issue certain checks against his account at said branch payable to Dean Witter & Company, the Appellant and said Vannatta knowing at the time thereof that there were insufficient funds in the Appellant's said account with which to honor and pay said checks, but which said checks were honored and paid by said Vannatta with moneys, funds and credits of said insured bank, and which said checks said Vannatta did not then and there charge against the Appellant's said account, but instead wilfully charged to and placed in the Deferred Items Account maintained at said branch, which

said checks were held by said Vannatta in said Deferred Items Account during certain periods of time, during which periods said moneys, funds and credits of said insured bank had been used by said Vannatta to so honor and pay said checks, without the receipt, during said periods, of any equivalent moneys, funds and credits by said insured bank to replace its own moneys, funds and credits so paid out, all as well known, intended, aided, abetted, counselled, induced and procured by the Appellant, as follows (R 4-17):

<u>Count</u>	<u>Date</u>	<u>Amount of Check</u>	<u>Period in Deferred Items Account</u>
I	July 30, 1959	\$ 9,200.00	July 30 - Aug. 11, 1959
II	Aug. 12, 1959	4,150.00	Aug. 12 - Aug. 20, 1959
III	Aug. 26, 1959	2,500.00	Aug. 26 - Aug. 28, 1959
IV	Sept. 2, 1959	6,202.50	Sept. 2 - Sept. 29, 1959
V	Sept. 23, 1959	19,525.00	Sept. 23 - Sept. 29, 1959
VI	Oct. 6, 1959	39,450.00	Oct. 6 - Oct. 27, 1959
VII	Oct. 15, 1959	8,200.00	Oct. 15 - Nov. 2, 1959
VIII	Oct. 23, 1959	16,100.00	Oct. 23 - Oct. 30, 1959
IX	Nov. 5, 1959	60,325.00	Nov. 5 - Nov. 28, 1959
X	Nov. 10, 1959	12,475.00	Nov. 10 - Nov. 28, 1959
XI	Nov. 28, 1959	5,600.00	Nov. 28 - Dec. 31, 1959
XII	Dec. 9, 1959	70,400.00	Dec. 9 - Dec. 31, 1959
XIII	Dec. 21, 1959	6,850.00	Dec. 21 - Dec. 31, 1959

On the same day (January 27, 1961) Appellant was arraigned, filed a Motion for Appropriate Relief (To Compel the Prosecution to Elect) (R-19), entered a plea of not guilty to each

count of the Information, and a Waiver of Trial by Jury was signed and filed (R-20). The case was tried, jury waived, before the Honorable George H. Boldt, United States District Judge, on January 30 and 31 and February 2, 1961.

Appellant moved for judgment of acquittal on the ground of insufficiency of the evidence at the close of the government's case, submitting a Request for Special Findings of Fact under Rule 23(c) of the Federal Rules of Criminal Procedure; the motion was summarily denied without the entry of any findings (R-245). Appellant again moved for a judgment of acquittal after all of the evidence was in which motion was again summarily denied (R-384). The Court then orally reviewed the evidence (R-384 - 389), answered the request for special findings of each in the affirmative (R-389) and found the Appellant guilty on all 13 counts of the Information (R-390).

During the course of the trial, certain testimony and exhibits were offered and accepted over objection of the Appellant pertaining to events which occurred subsequent to the period covered by the Information.

Appellant was adjudged guilty and sentenced by the Court to imprisonment and the imposition of a fine on February 10, 1961 (R-31). Notice of Appeal was filed on the next day, February 11, 1961 (R-32).

SPECIFICATION OF ERRORS

1. In ruling on the motion for judgment of acquittal after the close of the government's evidence the District Court erred in failing to weigh the evidence and enter special findings of fact setting forth whether, absent a defense, it would find the defendant guilty as to any of the counts of the Information.

2. The District Court erred in failing to grant Appellant's motion for judgment of acquittal:

- a. After the close of the government's evidence
- b. After all the evidence was closed.

3. The District Court erred in considering evidence of events subsequent to the period of the offenses alleged in the Information in determining the Appellant's guilt.

ARGUMENT

Summary

The principal argument relates to the insufficiency of the evidence to sustain the conviction of the Appellant herein on the offenses charged under 18 U.S.C. §§ 2 and 656. This is set forth under Specification of Error No. 2, the failure of the District Court to grant Appellant's motions for judgment of acquittal. It is contended that there is no evidence which could sustain a finding that the Appellant, a bank depositor who wrote checks with insufficient funds, knew that

the bank manager was wilfully concealing those checks contrary to bank regulations or making false entries in order to misapply moneys of the bank for Appellant's use with intent to injure or defraud the bank, or that Appellant knowingly collaborated or associated with the manager in those acts and with intent to injure or defraud the bank.

There are two collateral questions presented in Specifications of Error Nos. 1 and 3. It is contended that in a jury waived trial before denying a motion for judgment of acquittal after the close of the prosecution's evidence, the judge should weigh the evidence and determine whether he would find the defendant guilty if no further evidence were produced.

It is also argued that the Court below considered and was unduly influenced by inadmissible and prejudicial evidence of events which occurred subsequent to the period of the offenses alleged in the Information. This accounts for the finding of guilt in the absence of any evidence sufficient to sustain such a conviction.

Under the circumstances a judgment of acquittal of the Appellant should be ordered.

SPECIFICATION OF ERROR NO. 1

IN RULING ON THE MOTION FOR JUDGMENT OF ACQUITTAL AFTER THE CLOSE OF THE GOVERNMENT'S EVIDENCE THE DISTRICT COURT ERRED IN FAILING TO WEIGH THE EVIDENCE AND ENTER SPECIAL FINDINGS OF FACT SETTING FORTH WHETHER ABSENT A DEFENSE, IT WOULD FIND THE DEFENDANT GUILTY AS TO ANY OF THE COUNTS OF THE INFORMATION.

In ruling on a motion for judgment of acquittal under Rule 29(a), Federal Rules of Criminal Procedure, U.S.C.A., it is the duty of the trial court to weigh the evidence and the credibility of the witnesses. U.S. v. Empire Packing Company, 7 Cir. 1949, 174 F.2d 216 cert. den. 337 U.S. 959, 93 L. Ed. 1758. Moreover,

"Where the court is the trier of fact, the test to be applied to the evidence produced by the government is not whether it could sustain a conviction, but whether the government has so far substantiated its case that absent a defense the court would find the defendant guilty as to any of the counts of the indictment."

"A contrary rule, . . . would put upon the defendant the risk that by his own evidence, as by testimony produced on cross-examination, he might supply the evidence which convinces the trier of fact of his guilt, where absent such evidence the trier of fact would not be so convinced. To subject the defendant in a criminal case to such a risk would be contrary to the principles by which the criminal law has developed in this country. It would in effect require the defendant to assist in providing a vital element of the evidence which convicts him.

"The question before this court upon this motion, therefore, is not whether the evidence is substantial enough to warrant submission of the case to a jury, but whether the government has met its full burden of proof, that of showing beyond a reasonable doubt the guilt of the accused."

U.S. v. Camp, D.C. Haw. 1956, 140 F. Supp. 98, 99
c.f.: U.S. v. Cascade Linen Supply Corporation,
D.C.S.D.N.Y. 1958, 160 F. Supp. 565
U.S. v. Maryland & Virginia Milk Products
Association, D.C.D.C. 1950, 90 F. Supp. 681

There is no reason why the defendant in a criminal case should not be entitled to the same consideration as the defendant in a civil case tried to the court upon a motion to dismiss after the plaintiff has completed the presentation of its evidence under Rule 41(b), Federal Rules of Civil Procedure, 1946 Amendment, U.S.C.A., Vol. 5 Moore's Federal Practice, Par. 41.13 [4], pp 1044 - 1046. And this was considered the better practice as adopted by this and some other circuits prior to the 1946 amendment. Barr v. Equitable Life Assurance Society, 9 Cir. 1945, 149 F.2d 637. Since no specific provision in the Civil Rules was considered necessary to the adoption of such a practice it seems that the same should be true with respect to the Criminal Rules.

As Judge Murphy intimated in Camp, supra, a contrary rule would be tantamount to an abridgement of the defendant's rights under the Fifth Amendment to the Constitution of the United States, U.S.C.A.

Of course in that case the judge granted the motion and thus no procedural problems were involved. But where as here, the judge denies the motion, the question arises at this stage as to just what mental process he went through in so doing. In a jury waived trial the record is often devoid of anything from which the appellate court can determine the legal principles applied by the trial judge to the evidence. Occasionally resort is made to statements

made by the judge during argument. Wilson v. U.S., 9 Cir. 1958, 250 F.2d 312, 322 - 324. But this is the function of the request for special findings under Rule 23(c), Federal Rules of Criminal Procedure U.S.C.A. In this instance such a request for special findings was submitted to the trial judge at the time the motion was made (R-245, 23-25), but the motion was summarily denied without the entry of any such findings (R-245). Thus there is no way this Court can ascertain the standard of law which was applied. (Although it does not appear in the record the argument made on the motion urged the application of the principle of Camp upon the trial judge. However, as above stated there is nothing in the record or otherwise which would indicate that he adopted it.)

In the absence of any reasons given for the denial of the motion we cannot indulge in the presumption that the trial judge properly applied the law when he failed to make requested special findings at this stage of the trial. And a conviction cannot be sustained where it is likely that the judge applied the wrong standard of law in analyzing the evidence. Wilson, supra, 250 F.2d p. 312.

SPECIFICATION OF ERROR NO. 2

THE DISTRICT COURT ERRED IN FAILING TO GRANT APPELLANT'S
MOTION FOR JUDGMENT OF ACQUITTAL:

A. AFTER THE CLOSE OF THE GOVERNMENT'S EVIDENCE

B. AFTER ALL THE EVIDENCE WAS CLOSED.

Appellant moved for a judgment of acquittal both at the close of the government's evidence (R-245) and after all the evidence was in (R-384).

Although the trial court was required to weigh the evidence before it in each instance the general rule is that this court must review only the propriety of the denial of the latter motion. Gaunt v. U.S., 1 Cir. 1950, 184 F.2d 284, 290; cert. den. 340 U.S. 917, 95 L. Ed. 662. In other words the question here is whether there is sufficient evidence in the record as a whole to sustain the conviction. Appellant strongly contends there is not.

Of course the natural corollary to Appellant's argument on U.S. v. Camp, supra, 140 F. Supp. 98 would be to require this Court to analyze as well the government's evidence by itself in order to ascertain whether it alone would sustain a conviction. But none of the cases seem to so hold. In any event it is Appellant's position that the insufficiency of the evidence in the entire record is even more apparent than in the government's evidence alone. If we are correct in this view then of course Specification of Error No. 1 above becomes moot.

Briefly the undisputed facts show that the Appellant was an average businessman in the community who relied on

the manager of his bank, William Moss Vannatta in fiscal matters; that during 1959 he began to invest in the stock market with approximately \$19,000 or more derived from savings and money borrowed from his bank on appropriate collateral and with Vannatta's approval; that he then began to trade in the market and on occasions would write checks for the purchase of stock in amounts which exceeded his bank balance (R-22); that in each instance Vannatta gave his approval, at first after the fact and later on even before the fact; that Vannatta's approval was conditioned on Appellant's assurance that he would cover the check with a deposit within a short time, and in any event by the end of the month, and this was generally accomplished with a check issued by Dean Witter & Co. for the sale of stocks out of Appellant's account (R-21, 22).

Before analyzing the evidence it would be well first to set forth extracts from the decided cases which define the elements of proof and the law applicable to the evidence necessary to convict under §§ 2 and 656 of 18 U.S.C.:

"Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal." 18 U.S.C. § 2(a);

"Whoever, being an officer, . . . agent or employee of . . . [an] insured bank, . . . wilfully misapplies any of the moneys, funds or credits of such bank . . . shall be [punished]." 18 U.S.C. § 656.

The wilful misapplication and the aiding or abetting

thereof must be "with intent to injure and defraud" the bank (R-4-17). See the paraphrasing of the Information in the Statement of the Case above (pp 2 and 3), and Seals v. U.S., 8 Cir. 1955, 221 F.2d 243, Logsdon v. U.S., 6 Cir. 1958, 253 F.2d 12, 14-15, U.S. v. Vannatta, D.C. Haw. 1960, 189 F. Supp. 937, U.S. v. Cawthon, D.C. Ga. 1954, 125 F. Supp. 419. As will be seen from the cases this is an offense which requires specific intent and in such respect is similar to the crime of Federal income tax evasion under § 7201 Internal Revenue Code of 1954, 26 U.S.C.A. That section has been interpreted as involving a particular degree of criminal intent (specific) which has been characterized by this Court as "wilful willfulness."

The case most analogous to this one involving offenses alleges under 18 U.S.C. §§ 2 and 656 is Logsdon v. U.S., supra. The following extracts from that and other pertinent decisions are hereinafter set forth as a frame of reference from which to analyze the (in-)sufficiency of the evidence in this case:

"The most troublesome issue is raised by appellant's contention that the evidence was insufficient to take the case to the jury on the charge that he aided, abetted and induced the cashier to misapply the funds of the bank. We are not here dealing with the guilt of the cashier, which was adjudged through other proceedings. Since appellant was a depositor, but not an officer, director, agent or employee of the bank, he could not be guilty under Section 656, Title 18 U.S. Code, for misapplication of

the bank's funds. United States v. Tornabene, 3 Cir., 222 F.2d 875, 877. He was not so charged. Nor would he be guilty on account of the cashier's misapplication of funds unless he aided, abetted or induced the cashier to so act. Section 2(a), Title 18 U.S. Code. That is the offense charged. The absence of any showing of collaboration or association between the person charged and the principal prevents a conviction under that section. United States v. Moses, 3 Cir., 220 F.2d 166. . . . Overdrafts alone are not sufficient to show, in and of themselves, a violation of the statute. Seals v. United States, 8 Cir., 221 F.2d 243." 253 F.2d 14

"The crucial issue in the case would seem to be whether appellant knew that the cashier was paying his checks out of the bank's funds and hiding the checks away." (Emphasis added) 253 F.2d 15

"STEWART, Circuit Judge (dissenting)."

". . . To convict, the jury had to find collaboration or association between the appellant and the bank's cashier. United States v. Moses, supra." (Emphasis added)

"It is not enough that the appellant may have wilfully created the occasion or the opportunity for the cashier's misapplication of the funds, even though the appellant may have foreseen these consequences of this own misconduct." (Emphasis added). "United States v. Peoni, 2 Cir., 1938, 100 F.2d 401, 402. Aiding and abetting 'involves much more than merely 'causing an act to be done.'" United States v. Chiarella, 2 Cir. 1950, 184 F.2d 903, 909.

"What prevents me from joining in affirmance of the judgment is the belief that the trial court's instructions were inadequate to apprise the jury of these principles. The jury were instructed that if the defendant issued checks knowing that they would be paid by the cashier, although both knew that there were insufficient funds in the defendant's accounts to cover the checks, then the defendant was guilty of aiding and abetting the cashier in violating the statute.¹

"The jury could thus have found the appellant guilty of aiding and abetting without finding the association, participation or collaboration in the criminal venture which, as the majority opinion points out, the law requires. *Nye & Nissen v. United States*, supra; see *Morei v. United States*, 6 Cir. 1942, 127 F.2d 827, 830-831." 253 F.2d 16

"1. The pertinent instructions were as follows: 'Now, upon the whole case and after considering all the evidence (sic) you are satisfied beyond a reasonable doubt that the defendants J. D. Logsdon and Regina Logsdon committed the acts charged in the indictment in that they aided, abetted, counseled and induced Bernard Ware Barrett to wilfully misapply moneys, funds and credits of the insured bank by issuing checks drawn on the bank in the sum specified in the indictment knowing that Barrett would honor and pay these checks from funds of the bank when both Barrett and these defendants knew that there were insufficient funds in the accounts against which the checks were drawn with which to pay them, if you believe that beyond a reasonable doubt, it's your duty to find the defendants guilty. If you do not so believe, it's your duty to acquit them.'"

The foregoing dissent was cited with approval recently by this Court in Robinson v. U.S., 9 Cir. 1959, 262 F.2d 645, 651 where the appellant's conviction by the trial judge on a charge of aiding and abetting the sale of narcotics was reversed for lack of an adequate showing of collaboration. In that opinion this Court also quoted with approval the following from Morei v. U.S., 6 Cir. 1942, 127 F.2d 827, 830:

"'A person is not an accessory before the fact, unless there is some sort of active proceeding on his part; he must incite, or procure, or encourage the criminal act, or assist or enable

it to be done, or engage or counsel, or command the principal to do it. Halsbury, supra § 531.

Strictly speaking, in order to constitute one an accessory before the fact, there must exist a community of unlawful intention between him and the perpetrator of the crime. The concept of an accessory before the fact presupposes a prearrangement to do the act [cit.]; and to constitute one an aider and abettor, he must not only be on the ground, and by his presence aid, encourage, or incite the principal to commit the crime, but he must share the criminal intent or purpose of the principal." 262 F.2d 649

A bank depositor charged with aiding and abetting an employee of a member bank in misapplying moneys can, of course, be guilty only if the employee was guilty. U.S. v. Klock, 2 Cir. 1954, 210 F.2d 217. And as demonstrated above, the depositor must not only know that the employee is violating the law but also he must in some way collaborate in the acts which constitute the violation.

Quoting from Seals v. U.S., 8 Cir. 1955, 221 F.2d 243:

"The honoring of a check which creates an overdraft is not necessarily a violation of 18 U.S.C., Sec. 656. In reversing for excluding evidence bearing on intent, the court, in United States v. Klock, 2 Cir., 210 F.2d 217, 221, said:

' . . . In effect, the defense to the substantive counts of misapplication of funds was that the bank officials treated the overdrafts as loans. While perhaps making of loans in this manner may be in violation of some state law, nevertheless it does not constitute a crime under 12 U.S.C.A., Sec. 592 or 18 U.S.C., Sec. 656, if Klock had no notice of the impropriety. . . .'" 221 F.2d 243 * * * * *

"In 7 Am. Jur., Banks, Sec. 609, p. 442, it is stated:

'According to the general view, the payment of an overdraft by a bank amounts

to a loan to the depositor; for that reason the amount thereof may be recovered from the depositor.'

"See also 9 C.J.S., Banks and Banking, Sec. 353 (b), page 703.

"From the foregoing, it is apparent that in order to convict in this case the Government must go further than to show that the cashing of the defendant's check resulted in an overdraft. It must in addition show that Seals had an intent to injure or defraud the bank, or to aid or abet Mrs. Simmington in so doing. The crucial question on this appeal is whether the record contains evidence which will support a finding that Seals intended to injure or defraud the bank. . . ."
221 F.2d 246

* * * * *

"There is no direct evidence as to Seals' financial responsibility, except that the evidence shows that he was able to and did produce the money to meet the check promptly upon demand. It is true that if a crime has been committed restitution does not wipe out the crime. However, financial responsibility and repayment are material considerations on the issue of intention to defraud. United States v. Wicoff, 7 Cir., 187 F.2d 886; United States v. Klock, supra; United States v. Matot, supra." 221 F.2d 249

And from Evans v. U.S., 153 U.S. 584, 592:

". . . The case is not unlike that of purchasing goods and obtaining credit. If a person buy goods on credit, in good faith, knowing that he is unable to pay for them at the time, but believing that he will be able to pay for them at the maturity of the bill, he is guilty of no offence, even if he be disappointed in making such payment. . . . In United States v. Britton, 108 U.S. 193, in which the charge was that the defendant, being president and director of the association, and, being insolvent, procured his own note to be discounted, the same not being well secured, the payee and the endorser thereof, being also insolvent, which he, defendant, well knew. The incriminating facts were that the note was not well secured, and that both the maker and endorser were, to the knowledge of the defendant, insolvent when the note was discounted. The question there presented was whether the procuring of the discount of such a note by an officer of the

association was a wilful misapplication of its moneys within the meaning of the law. It was held that it was not. The criminality really depends upon the question whether there was, at the time of the discount, a deliberate purpose on the part of the defendant to defraud the bank of the amount."(Emphasis added)

And from U.S. v. Steinman, 3 Cir. 1909, 172 Fed. 913, 915:

". . . An overdraft of an account is not per se and necessarily an abstraction of the bank's funds under section 5209 by the drawer of a check who had not funds to meet it, nor is the payment of such overdraft check by an executive officer of the bank, without action by the Board, necessarily a misapplication under such section. Indeed, in Bolles on Modern Banking, page 199, it is said:

"Generally, two kinds of overdrafts are as clearly justified as any other kind of a loan: (1) an unintentional overdraft by a depositor in good standing, and possessing ample means to pay; (2) an overdraft to be paid in pursuance of a prior agreement, resting on abundant credit."

The basic elements of proof necessary to convict the Appellant under this Information which were gleaned from the foregoing cases, are set forth in the Request for Special Findings of Fact (R-24, 25). Although the Court in finding the Appellant guilty on all counts answered each of said requested findings in the affirmative (R-389) the record is devoid of any evidence which would sustain such a finding as to requests 3, 4 and 5; i.e. that the Appellant knew that William Moss Vannatta wilfully concealed Appellant's checks contrary to bank regulations or made false entries in order to misapply moneys of the Bank for the use or benefit of the Appellant, with intent to injure or defraud

the Bank, and that Appellant knowingly collaborated or associated with Vannatta in those acts and with intent to injure or defraud the bank.

With respect to the checks set forth in the Information Mr. Vannatta testified on direct examination that each time one of them was received at the Bank he would call the Appellant and tell him to come in and cover it as soon as possible and that the Appellant would agree to do so (R-194).

On cross-examination he stated that it was not an unusual practice in the Bank to hold such checks in deferred items for considerable lengths of time and that early in July a check for \$4,825 was handled similarly on his own initiative by the assistant manager in Vannatta's absence (R-200-203). He further stated that on some occasions the Appellant would call him to advise him he had written a check or even to get his approval before writing one (R 204); and that he had conversations with Mr. Chun of Dean Witter & Co. relative to Appellant's credit and whether he would honor checks being written by the Appellant for the purchase of stock and also relative to deposits forthcoming from Dean Witter to the account from the sales of stock to cover outstanding overdrafts (R 205-207). This was essentially verified by Mr. Chun although he was quite evasive about it (R 259-264).

Mr. Chun also testified that the Appellant told him it was necessary to settle his account with the bank at

the end of each month (R 266-7, 271-273).

Mr. Vannatta further testified that his reason for approving the Appellant's checks written when there were insufficient funds in the account was a matter of good public relations and that he considered the Appellant a good customer and wanted to accomodate him; and further that he at no time advised the Appellant that it was necessary for him (Vannatta) to indulge in irregular banking procedures in order to accomplish this (R 228).

"THE COURT: All right. Now, from your various conversations with Mr. Benchwick and Mr. Chun, from the records, it was quite apparent on the face of it that Benchwick was trading in stocks with the moneys derived from these checks --

"THE WITNESS: Yes.

"THE COURT: -- at Dean Witter, right?

"THE WITNESS: Yes

"THE COURT: In other words, that he was using the money and credit of the bank for his stock trading operation without any interest or other compensation coming to the bank for it. It is obvious on the face of it?

"THE WITNESS: Yes.

"THE COURT: You must have known it. It couldn't possibly have been otherwise, could it?

"THE WITNESS: No, it couldn't.

"THE COURT: Did you ever discuss that with Benchwick?

"THE WITNESS: No.

"THE COURT: Did you ever mention to him the fact that he was using the bank's money to trade in stocks?

"THE WITNESS: No, I never did.

"THE COURT: You never mentioned it to him at all?

"THE WITNESS: No.

"THE COURT: Did he ever mention it to you?

"THE WITNESS: No.

"THE COURT: Did you ever tell him that you were going to terminate this practice, that is, up until the very time that these last checks were involved?

"THE WITNESS: No, I never did.

"THE COURT: You never told him that you were going to terminate it and refuse to honor further checks?

"THE WITNESS: No.

"THE COURT: You must apparently have intended to do this indefinitely, then, right?

"THE WITNESS: I don't know.

"THE COURT: I beg your pardon?

"THE WITNESS: I don't know.

"THE COURT: Well, in any case, you never evidenced any intention to stop it?

"THE WITNESS: I never told him that.

"THE COURT: Never told him. All right. Now, did you ever report this matter to the bank superiors that this kind of thing was going on?

"THE WITNESS: No.

"THE COURT: What possible advantage or benefit to the bank can you conceive could come from such a course of conduct over a period of months in this way?

"THE WITNESS: There couldn't be any.

"THE COURT: What?

"THE WITNESS: There couldn't be any.

"THE COURT: On the other hand, it was apparent that the bank was suffering loss and injury continually by these transactions?

"THE WITNESS: Yes.

"THE COURT: That is right on the face of it, isn't it?

"THE WITNESS: On the face of it.

"THE COURT: If there is any other explanation, God knows, I want to hear it. You say Benchwick never mentioned anything about the fact that he had this arrangement for using the bank's money?

"THE WITNESS: No, he didn't sir.

"THE COURT: That is all I have."

(R 238-241)

Also attorney Myer Symonds related an interview with the Appellant on December 24, 1959 during which the latter told him he had written two checks totalling approximately \$76,000 (apparently the checks of December 7 and 17 the subject of Counts XII and XIII) for the purchase of stock and for which he did not have sufficient funds in the bank

because the stock had gone down. He further stated to Mr. Symonds that these checks were written pursuant to an arrangement he had with the Bank and that the Bank was well aware of it, that he had been doing it for some time and there was nothing wrong with it because the Bank knew what he was doing (R 281-284). Appellant verified this (R-321) and further stated that he related the same story to his wife's attorney who also disbelieved him (R-322).

Appellant testified that he relied on Mr. Vannatta as manager of the Bank in all fiscal matters and the handling of his accounts at the Bank and that it never occurred to him Mr. Vannatta was doing anything wrong (R 300-302); further that he had no prior experience of this nature in dealing with bank accounts (R-305); that Mr. Vannatta approved his writing these checks (R-304), instructing him to cover them by the end of the month which was done by ascertaining the amount outstanding from Vannatta and selling sufficient stocks to cover it (R-306, 7).

Contrast this with the facts set forth in the Logsdon case, supra; 253 F.2d 12:

"The Bank of Whitesville was closed by Kentucky and Federal Deposit Insurance Corporation bank examiners on September 16, 1954. Their examination disclosed that Barrett had misapplied funds and credits of the bank by means of withdrawing and hiding ledger sheets, juggling accounts, overstating cash on deposits with correspondent banks, and by withdrawing

and hiding checks drawn on the Bank of Whitesville so that such checks, although honored by the Bank, were not charged against the accounts of the various depositors." 253 F.2d 13

* * * * *

"A review of the evidence shows more than the usual type of overdraft. During a period of 4½ years appellant and his wife issued checks aggregating \$149,415.14 on his personal account at the bank in which there were total deposits of only \$74,710.20, leaving an overdraft of \$74,704.94, represented by 565 checks which were hidden away by the cashier. Their joint income tax return for 1953 showed income of \$8,271.28. Checks written on this account and paid by the bank in 1953 totaled \$13,941.93. The account of the Alabama-Kentucky Building Supply Company was overdrawn in the amount of \$159,613.13 over a period of a year and seven months, represented by 557 checks which were hidden away by the cashier. The income tax return of the Company for 1953 showed gross receipts of \$117,414.09. The Company issued checks for that year in the total sum of \$211,888.20, which were paid. The cashier testified not only that he notified appellant numerous times that he was overdrawn and that appellant would say that he had some money coming in from the sale of property and would cover the overdraft, but also that appellant knew that when his checks arrived at the bank he, the cashier, would honor them and pay for them out of the bank's funds. It was not shown that he received anything of value from the appellant for handling his checks in such manner. It presents a most unusual and somewhat amazing situation.

"Appellant's defense was his lack of education, the fact that his personal account and the account of the Company were mixed together, the fact that he did not keep check book stubs and only checked the checks returned by the bank to make sure that the checks bore proper signatures, a very inadequate system of bookkeeping, his belief that he always had enough money in the bank to cover the checks, and a denial that the cashier ever told him he was holding checks which he had paid without charging them to his account." 253 F.2d 15

In that case there was evidence that the depositor knew the cashier was hiding checks away and that they were never

charged to his account or covered by deposits! Even so, as pointed out above the majority opinion stated "The most troublesome issue is raised by appellant's contention that the evidence was insufficient." 253 F.2d 14. However the court went on to sustain the conviction by finding the requisite criminal intent through the appellant's reckless disregard of the interests of the bank.

But this conclusion is questionable in view of the concession that there must be some showing of collaboration between the aider and the principle in the unlawful act. As stated by Judge Stewart in his dissent, (endorsed by this Court in Robinson, supra, 262 F.2d 645, 651):

"It is not enough that the appellant may have wilfully created the occasion or the opportunity for the cashier's misapplication of the funds, even though the appellant may have foreseen the consequences of his own misconduct [cit.]". 253 F.2d 16

There is not only no evidence in this record of Appellant's knowing collaboration with Vannatta in the unlawful act, i.e. indulging in improper banking practices with intent to defraud the bank, but the only evidence on the subject positively establishes that the Appellant had no knowledge that Vannatta was actually doing anything irregular. If Appellant collaborated, then so did Dean Witter & Co., Mr. Chun, the Bank employees under Mr. Vannatta and at the Main Office, and the telephone company, etc. Robinson v. U.S., supra, 262 F.2d p. 649.

The Court below apparently presumed from the fantastic nature of the story presented that the Appellant was guilty; accepting the testimony of Vannatta and the Appellant in order to supply some element of collaboration (R-389) yet rejecting it in concluding the element of criminal intent. (R-387, 388. Compare this with the instruction which was criticized in Judge Stewart's dissent in Logsdon set forth above on pp 13 and 14).

Apparently the Judge overlooked the fact that this is a crime involving specific intent as demonstrated by the dissent in Logsdon, which cannot be supplied alone through the "reckless disregard" concept.

"It is settled by the decisions of the courts that the misapplication condemned by the statute is something more than an irregular or improper use of the bank's funds."
Johnson v. United States, 4 Cir. 1958,
95 F.2d 813, 816.

As set forth in the Request for Special Findings (R 24-25) there must be a specific finding not only that Appellant, in writing these checks, intended to defraud the Bank but also that he knew Vannatta was mishandling or concealing the checks contrary to bank regulations or making false entries in order to misapply the bank's money for Appellant's use with intent to injure or defraud the bank.

The oral decision of the Court below (R-384-389) does not sustain its final conclusion:

"I answer the request for specific findings of fact in each instance in the affirmative. In my judgment the evidence shows beyond a reasonable doubt that each and all of the questions must be answered in the affirmative."
(R-389, -90)

SPECIFICATION OF ERROR NO. 3

THE DISTRICT COURT ERRED IN CONSIDERING EVIDENCE OF EVENTS SUBSEQUENT TO THE PERIOD OF THE OFFENSES ALLEGED IN THE INFORMATION IN DETERMINING THE APPELLANT'S GUILT.

Ordinarily in a case tried to the Court without a jury the rules of admissibility of evidence on the ground of relevance are somewhat relaxed inasmuch as it is generally assumed that the Judge will consider only the relevant evidence in making his findings. A reading of the record here will show that much of the evidence was thus admitted without a prior showing of relevance.

Nevertheless the facts of this case present a most unusual situation, both as to events occurring after the period of the indictment as well as before. It is Appellant's contention that his same fears of the outcome of a jury trial were realized even in the absence of a jury, that is, that these subsequent events caused the trier of fact to find Appellant guilty without regard to the inadequacy of the proof required to sustain the offenses with which the Appellant was charged.

To summarize the facts briefly, the Appellant, after establishing a "line of credit" with the Bank through its

manager Mr. Vannatta during the year 1959 in order to trade on the stock market, suddenly became irrational in his method of trading to the point where he thought he had lost so much that there was insufficient in his stock account to cover his outstanding obligations. As a result of this he did many other irrational things after the period of the Information, the most flagrant of which was to cash in all of his stocks in an attempt to recoup his losses on the gambling tables of Las Vegas. Being unsuccessful at this as well, he was then hopelessly unable to cover his outstanding checks with the Bank, and thus the Bank lost over \$82,000.

The Court overruled objections to the admissibility of prosecution's Exhibits 3, 4 and 5 being checks made payable to Appellant by Dean Witter & Co. subsequent to the period of the Information (R-133) and to the testimony of Mr. Kawamura relative to the disposition of Exhibit 3 (R-135), and later allowed a running objection to any evidence relative to events occurring subsequent to the period of the Information (R-197).

"What defendant did with said funds is immaterial. The alleged offense [if at all] was completed when the abstractions occurred."
U.S. v. Ruse, D.C. Pa. 1933, 112 F. Supp.
667, 668

". . . if the criminal act is not committed at the time, we cannot take a subsequent act and retroject it to the time [of the alleged offense] and charge it as criminal. . . . we cannot base

criminality solely upon something that was done after the [date of the alleged offense], unless it is of a character to show conclusively the existence of the criminal purpose at the earlier date." U.S. v. Cole, D.C.S.D. Cal. 1950, 90 F. Supp. 147, 154.

It is difficult to venture what part such evidence played in influencing the Judge's decision. However, some clue can be gotten from the pressing questions asked of the Appellant by the Judge (R 379-382):

"THE COURT: Mr. Benchwick, at the time you left the islands here to return to the mainland you had three checks outstanding to the Bank of Hawaii, \$5600 and 70,400 and 6,850; of course, you knew you had those checks outstanding?

"THE WITNESS: I wouldn't know about the checks outstanding, but I had a rough figure of the total.

"THE COURT: Yes. Well, I mean you knew you had checks in a very sizeable amount outstanding?

"THE WITNESS: Yes, your Honor.

"THE COURT: You talked about it to Vannatta, you said.

"THE WITNESS: Yes, your Honor.

"THE COURT: All right. And the total of those checks totals up, if my arithmetic is correct, to some 82,000 several hundred dollars odd.

"THE WITNESS: Yes.

"THE COURT: 70,000, 6,000, 5,000 odd; right?

"THE WITNESS: Yes, your Honor.

"THE COURT: Of course, when you left the islands, then, you knew that you owed the bank 82,000 odd dollars?

"THE WITNESS: Your Honor, I was so confused --

"THE COURT: Well, regardless of that, the fact remains, you knew.

"THE WITNESS: I knew I owed them an awful lot of money.

"THE COURT: All right. 82,000 odd it figures up. Now, when you had those stocks cashed you netted an amount more than sufficient to pay the bank what you owed them, didn't you?

"THE WITNESS: At that time, your Honor, I did not know. At that time I just --

"THE COURT: Can't you answer that question? Here are two checks that I have in my hand, exhibits, one of them is 55,341 and the other is 28,422, and if you add those together it comes to 83,700 odd dollars, roughly about \$1,000 more than you needed to pay the bank what you owed them; right?

"THE WITNESS: According to your statement, yes, your Honor.

"THE COURT: Instead of doing that, you took off up to Las Vegas in the manner you have described.

"THE WITNESS: Your Honor, I thought I was about \$18,000 in the hole. That's why I went to see the attorneys. And I -- by poor calculation, and as I said, I could see now what has been done, and even as my attorney has mentioned to me, that you had the money, yet, I can honestly state I didn't think I had a sufficient amount of money, but even so, when I left for the mainland I did not have any --

"THE COURT: Well, stop a moment on that. You know, of course, that Vannatta -- you were talking to Vannatta on the phone, he was writing to you about the matter; why didn't you ask him how much you owed?

"THE WITNESS: He never wrote me, your Honor, about the matter.

"THE COURT: Well, did you ever ask him how much money you owed the bank. Did you take any interest in it, what you owed them, when you left here with all your property and your family and whatnot?

"THE WITNESS: Yes, I did.

"THE COURT: And what did they tell you that you owed them?

"THE WITNESS: The last account I could recall, your Honor, was in November, and I had started to straighten --

"THE COURT: I am talking about the time that you left here to go back to the mainland, sold your property and one thing and another, did you ever find out from the bank or ask Mr. Vannatta how much you owed and what it took to clear you?

"THE WITNESS: Your Honor, I had intentions of coming back.

"THE COURT: The question is, did you ask anybody so that you would know where you stood with respect to this matter at the time you left?

"THE WITNESS: No, your Honor.

"THE COURT: You didn't do that?

"THE WITNESS: No.

"THE COURT: Did you ask about it at the time you had these stocks sold, producing this large sum, 80 odd thousand dollars?

"THE WITNESS: No, your Honor, I didn't. As I have testified previously, I never thought I had that much money in stocks.

"THE COURT: But it is apparent now on the face of it that you had more than enough to pay the bank everything you owed them, isn't it.

"THE WITNESS: I can see that, your Honor, yes.

"THE COURT: That is all. Step down. Call another witness."

Also in the comment made by the Judge to the Appellant at the time of setting bail after conviction:

"You should have been thinking of your family when you took off with all this money. . . ." (R-393)

Actually this Specification of Error is set forth primarily for the purpose of suggesting a reason why the Trial Judge found the Appellant guilty in spite of the lack of competent evidence as set forth in Specification of Error No. 2 above.

CONCLUSION

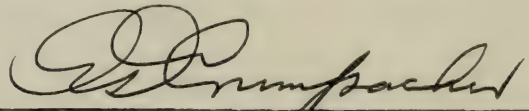
It is respectfully submitted that the evidence may have been sufficient to find that the Appellant committed some offense such as fraudulent drawing (a misdemeanor) under § 286-1, Revised Laws of Hawaii 1955. And the inadmissible and prejudicial evidence of subsequent events might even support a charge of gross cheat under § 289-1, Revised Laws of Hawaii 1955. Certainly the Appellant was morally wrong in breaking faith with the Bank when he failed to cover the last 3 checks. But these are no reasons to

convict him under 18 U.S.C. §§ 2 and 656, without legal and competent evidence that he committed those offenses.

It is apparent that the Government presented all the evidence available to it and therefore "the defects in the evidence" could not be supplied upon a retrial. Bryan v. U.S., (1950) 338 U.S. 557, 559, 94 L. Ed. 340. For this reason the judgment of the District Court should be reversed and the cause remanded with directions to vacate the judgment of sentence herein and enter a judgment of acquittal of the Appellant. Karn v. U.S., 9 Cir. 1946, 158 F.2d 568, 573. Klee v. U.S., 9 Cir. 1931, 53 F.2d 58, 62. U. S. v. Gardner, 7 Cir. 1948, 171 F. 2d 753, 759.

Dated: Honolulu, Hawaii, June 29, 1961.

Respectfully submitted,



E. D. CRUMPACKER
Attorney for Appellant

Of Counsel
CRUMPACKER & STERRY

APPENDIX

Cr. No. 11,546 U.S. v. Stephen R. Benchwick

PLAINTIFF'S EXHIBITS

<u>EXHIBITS</u>	<u>IDENTIFIED</u>	<u>OFFERED</u>	<u>RECEIVED</u>
#1-A to			
1-S	68	159	159
#2-A to			
2-MM	69	159	159
#3	21	185	185-187
#4	21	185	185-187
#5	21	185	185-187
#6	74	159	159
#7	74	159	159
#8	74	159	159
#9	177	178	178
#10	236	236	243
#11	242	242	243
#12	242	242	243

DEFENDANT'S EXHIBITS

"A"	254	254	255
"B-1 to			
"B-18"	257	257	257
"C-1" &			
"C-2"	86	284	284
"D-1" &			
"D-2"	86	284	284
"E-1" to			
"E-7"	86	284	284
"F-1" to			
"F-3"	86	284	284
"G-1" &			
"G-2"	86	284	284
"H-1" to			
"H-6"	86	284	284
"I-1" to			
"I-5"	86	284	284
"J-1" to			
"J-5"	86	284	284
"K-1" to			
"K-5"	86	284	284

DEFENDANT'S
EXHIBITS (continued)

	<u>IDENTIFIED</u>	<u>OFFERED</u>	<u>RECEIVED</u>
"L-1" to			
"L-5"	86	284	284
"M-1" to			
"M-7"	86	284	284
"N-1" to			
"N-6"	86	284	284
"O"	134	137	137
"P"	149 - 151	151	152
"Q"	149 - 151	151	152
"R"	156, 157	157	157
"S"	247	248	248
"T"	285	382	382

No. 17,389

IN THE

United States Court of Appeals
For the Ninth Circuit

STEPHEN R. BENCHWICK,	} <i>Appellant,</i>
VS.	
UNITED STATES OF AMERICA,	

On Appeal from the United States District Court for the
District of Hawaii in Criminal No. 11,546

BRIEF FOR APPELLEE

HERMAN T. F. LUM,
United States Attorney,
District of Hawaii,
Attorney for Appellee.

FILED

MAY 2 1961

U.S. DISTRICT COURT
DISTRICT OF HAWAII

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No. 17,389

IN THE

**United States Court of Appeals
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STEPHEN R. BENCHWICK,	} <i>Appellant,</i>
VS.	
UNITED STATES OF AMERICA,	
	} <i>Appellee.</i>

On Appeal from the United States District Court for the
District of Hawaii in Criminal No. 11,546

BRIEF FOR APPELLEE

JURISDICTIONAL STATEMENT

Appellee agrees with appellant's statement as to this Court's jurisdiction to hear this appeal, and as to the jurisdiction of the Court below.

STATEMENT OF THE CASE

Appellant, age 37 and sales engineer with Dearborn Chemical (R. 287-291), was charged with a thirteen count Information for violating Title 18, United

States Code, Sections 2 and 656, filed against him under waiver of indictment (R. 2).

The thirteen counts charged that appellant on thirteen different and separate dates did knowingly, wilfully and feloniously, with intent to injure and defraud an insured bank, Bank of Hawaii, aid, abet, counsel, induce and procure William Moss Vannatta, branch manager, to defraud and injure said bank, for thirteen separate amounts, ranging from \$2500.00 to \$70,400.00.

The uncontroverted evidence produced during the trial showed that appellant, a depositor with the Aiea Branch of the Bank of Hawaii where Mr. William Moss Vannatta was the branch manager (R. 301), began in 1959 with around \$20,000.00 (\$6,000.00 from savings and \$14,000.00 from a mortgage on his house), to speculate in the stock market (R. 298-299).

The evidence further showed that on January 20, 1959, appellant's existing collateral loan of \$2,000.00 was reset by Vannatta to a commercial loan of \$5,525.00 (R. 76) which amount was also used by appellant to speculate in the stock market.

On April 9, 1959, appellant purchased more stocks through Dean Witter & Company and paid for these stocks with a check in the amount of \$10,848.00 drawn on the Bank of Hawaii, Aiea Branch, where appellant's account had an insufficient balance of \$2,242.21 (R. 194). Vannatta on April 13, 1959, authorized this non-sufficient fund check to be posted in the deferred items account and held there until April 24, 1959,

when the amount was then charged to appellant's account (R. 194).

Following this date to November 6, 1959, on numerous other occasions, appellant and Vannatta continued this same arrangement where appellant would draw on his account which was either of insufficient funds or overdrawn and Vannatta would order the non-sufficient fund checks be placed in the deferred items accounts for periods of 2 days to 27 days (R. 22, 194).

On November 24, 1959, December 7, 1959, and December 17, 1959, appellant wrote three checks for \$5,600.00, \$70,400.00, and \$6,850.00, respectively (Exhibits 6, 7 and 8). These checks were again placed by Vannatta in the deferred items account (R. 22) because of insufficient funds. Appellant, however, failed to cover these checks by a deposit to his account when he sold all his stocks totalling \$83,341.00 (R. 325-328), but instead lost most of it gambling in Las Vegas, Nevada (R. 327). Bank of Hawaii honored these checks and suffered the loss (R. 67).

During these periods while appellant's non-sufficient fund checks were held in the deferred items account, appellant speculated on the stocks he purchased expecting to sell at approximately the end of each month at a profit. When the stocks were sold the funds were deposited to his account to cover the non-sufficient fund checks (R. 258, 263, 272), except for the last three checks.

Although bank funds and credit were used by appellant, he paid no interest (R. 88). Vannatta and appellant had set up a collateral receipt arrangement

but this was loosely handled, and stock receipts were substituted freely (R. 76-81).

In fact, during the latter part of 1959, when appellant asked Vannatta for the stock certificates, Vannatta freely gave them to him which enabled appellant to dispose of the stocks represented by the certificates and to pocket the funds (R. 195).

No purpose statement, used by banks to prevent widening of margin, was ever required of appellant (R. 127).

The arrangement was such that on occasions when appellant wrote these checks, he called Vannatta for his approval (R. 203-204), and Vannatta would then assure Dean Witter & Company that the checks would be honored by the bank (R. 208).

Vannatta was aware that appellant was using funds to purchase stocks (R. 205). Appellant likewise understood the arrangement and knew that Mr. Vannatta would hold the non-sufficient fund checks which appellant had written (R. 359). Appellant further knew he was using the bank funds to speculate in the market (R. 360).

The Court found from the evidence that there were constant cooperation and collaboration by appellant and Vannatta with a view to the bank's honoring appellant's non-sufficient fund checks which was a fraud on the bank (R. 387).

The Court found appellant guilty on all thirteen counts (R. 390) and from which appellant now brings his appeal.

ARGUMENT

I

IN A NON-JURY TRIAL THE DISTRICT COURT UPON REQUEST OF APPELLANT IS NOT REQUIRED TO ENTER SPECIAL FINDINGS OF FACT AT THE CLOSE OF GOVERNMENT'S EVIDENCE BUT ONLY AT TIME OF GENERAL FINDINGS.

Although the District Court made special findings at the time it made the general findings (R. 245), appellant argues that the Court erred because upon request by appellant it failed to make special findings of fact at the time it denied appellant's motion to acquit at the close of the Government's evidence. For this reason, appellant is without knowledge as to what mental process the Court went through, or what standard of law the Court applied in denying appellant's motion to acquit.

Appellant cites no cases or authorities in point but merely contends that a defendant in a criminal case should be entitled to the same consideration as a defendant in a civil case under Rule 41(b), Federal Rules of Civil Procedure, 1946 Amendment, U.S.C.A.

Rule 23(c) requires that in all cases tried without a jury, the Court or judge must make a general finding. In addition to a general finding, on request, the Court or judge must find the facts specially. *Barron & Holtzoff*, Federal Practice & Procedure, § 2124.

Failure of the Court to make general findings without the special findings, upon request, would result in reversible error. *United States v. Morris*, 263 F.2d 594 (C.A. 7).

As stated in *Cesario v. United States* (1 Cir. 1952), 200 F.2d 232, 233, “. . . That rule (Rule 23(c)) in-

dicates the proper procedure by which a defendant may preserve a question of law for purposes of appeal. . . .”

Does Rule 23(c) require the Court, upon request, to find the facts specially before it can rule on a motion to acquit at the close of the Government’s evidence? The Government contends that the only reasonable interpretation to be given this Rule is that it mandates the Court in a jury waived trial to make special findings at the time of general findings only and at no other time. To say otherwise would require the Court to make special findings upon request on every motion served by litigants in a non-jury criminal trial. Words in a statute are to be given their known and ordinary signification, and the obvious, plain and rational meaning is preferable to a narrow, strained or hidden meaning. *United States Gypsum Co. v. United States*, 253 F.2d 738.

Appellant’s request for special findings was made prematurely at the close of the Government’s evidence (R. 23, 25), and the Court properly reserved the right to answer and did answer each request at the time of general findings (R. 245).

II

THE DISTRICT COURT PROPERLY DENIED APPELLANT'S MOTION TO ACQUIT BOTH AFTER THE CLOSE OF THE GOVERNMENT'S EVIDENCE AND AFTER ALL THE EVIDENCE WAS CLOSED.

Inasmuch as appellant concedes that this Court must review only the propriety of the latter motion, no argument will be made here on the first motion.

Appellant argues that there is insufficiency of evidence in the entire record to support the District Court's finding of guilt, and that the record is devoid of any evidence to sustain the Court's finding on each of the special findings of fact, more specifically, that appellant knew that Vannatta wilfully concealed appellant's checks contrary to bank regulations or made false entries in order to misapply moneys of the bank for the use and benefit of appellant, with intent to injure or defraud the bank, and that appellant knowingly collaborated or associated with Vannatta in those acts with intent to injure and defraud the bank.

Appellant's argument essentially may be stated that this is a crime requiring intent (intent to injure the bank) and unless appellant had knowledge of what Vannatta was doing or collaborated or associated with Vannatta, there could be no intent and the failure of the record to show this necessary ingredient requires this Court to acquit appellant.

Intent is one of the essential elements of the offense of aiding and abetting under 18 USC §§ 2(a) and 656. *United States v. Wicoff* (7 Cir.), 187 F.2d 886. The

intent to injure the bank is a necessary element of the crime. *Logsdon v. U. S.* (6 Cir. 1958), 253 F.2d 12. The absence of any showing of collaboration or association between the person charged and the principal prevents a conviction. *United States v. Moses* (3 Cir.), 220 F.2d 166. In order to aid and abet another to commit a crime, it is necessary that a defendant in some sort associate himself with the venture, that he participates in it as in something that he wishes to bring about, that he seeks by his action to make it succeed. *United States v. Peoni*, 100 F.2d 401.

As stated by appellant in his Opening Brief, the case of *Logsdon v. U.S., supra*, is most analogous to this one.

In that case, Logsdon was convicted under an indictment which charged in thirty-five counts that he aided, abetted and induced a codefendant Barrett, a cashier in a bank, to wilfully misapply moneys and funds of the bank, in violation of Sections 2(a) and 656 of Title 18, United States Code.

Logsdon wrote checks on his personal account and the building supply company account of which he had control, knowing that there were insufficient funds in both to cover the checks.

Barrett cashed these checks, and for a period of 4½ years was able to conceal this from bank examiners by means of withdrawing and hiding ledger sheets, juggling accounts, overstating cash on deposit with correspondent banks, and by withdrawing and hiding checks.

During this 4½ years, Logsdon issued 565 checks aggregating \$149,415.14, and was overdrawn in his personal account in the amount of \$74,704.94. From the building supply company account, in one year and seven months, he issued 557 checks and was overdrawn in the amount of \$159,613.13.

The cashier testified not only that he notified Logsdon numerous times that he was overdrawn and that Logsdon would say that he had some money coming in from the sale of property and would cover the overdraft, but also that Logsdon knew that when his checks arrived at the bank the cashier would honor them and pay for them out of bank funds. It was not shown that the cashier received anything of value from Logsdon.

The evidence fails to specifically show any reason for the actions of the cashier. The cashier repeatedly stated in his testimony that he didn't know why he did it, and at one point stated that mental fatigue was the only thing he could think of.

Logsdon's defense was his lack of education, the fact that his personal account and the account of the company were mixed together, the fact that he did not keep check book stubs and only checked the checks returned by the bank to make sure the checks bore proper signatures, a very inadequate system of bookkeeping, his belief that he always had enough money in the bank to cover the checks, and a denial that the cashier ever told him he was holding checks which he had paid without charging them to his accounts.

From the evidence, the jury convicted, and Logsdon contends on appeal, among other things, that the evidence was insufficient to take the case to the jury on the charge that he aided, abetted and induced the cashier to misapply the funds of the bank. And Logsdon further contends that although the evidence shows overdrafts on his checking accounts, it does not show any collaboration between him and the cashier or any attempt on his part to induce the cashier to withhold his checks without charging them to his account, although paid out of the bank funds.

The Court stated:

“As hereinabove stated, we agree with appellant that intent to injure the Bank was a necessary element of the crime. Intent may be shown by circumstantial evidence, and in criminal cases, that is usually the only evidence available. A reckless disregard of the interests of the Bank, as shown by the evidence in this case, was sufficient to warrant a finding by the jury of an intent to injure or defraud the Bank. A person is presumed to have intended the natural consequences of his acts. *Mulloney v. United States*, 1 Cir., 79 F.2d 566, 584; *Savitt v. United States*, 3 Cir., 59 F.2d 541, 543. We find no error in the instructions of the District Judge upon this issue.”

Compare the instant case with the *Logsdon* case, *supra*, and note the similarities of facts, including the question on appeal.

Like the cashier in the *Logsdon* case, Vannatta did not receive anything of value from appellant for

placing the checks in the deferred account, nor could he give any reason why he did it. Both cases involved insufficient funds in the checking accounts. Although this case covered a period of months, almost a year, like the *Logsdon* case, it involved numerous transactions. Over this period of time, checks in the aggregate amount of some \$240,000.00 were written (R. 22). Actual loss to the bank, or the amount overdrawn, was \$83,341.00 (R. 325-328).

Like *Logsdon*, appellant was notified numerous times to cover his insufficient checks, and like *Logsdon* he made many assurances that he would do so. On other occasions, appellant would call Vannatta for his approval to write these checks (R. 203, 204), and Vannatta would assure Dean Witter (payee) that the checks would be honored (R. 208). Like *Logsdon*, appellant knew that the checks would be held until they were covered (R. 359). Appellant also knew he was using bank funds to speculate in the market (R. 360).

Appellant's argument that he had no knowledge of Vannatta's irregular handling of the checks and that there was no knowing collaboration hardly seems tenable in view of the foregoing.

Appellant seems to be confused between his argument on knowledge, collaboration and intent.

Intent, as earlier stated in the *Logsdon* case, *supra*, is a necessary element of a crime. Intent may be shown by circumstantial evidence. Knowledge and collaboration are merely evidence of intent and like the ingredient of intent, they may be proven by circumstantial evidence.

That appellant had knowledge that Vannatta was holding up his insufficient fund checks until he covered them is undisputed. At times, he would call Vannatta to get his approval to write these checks and at other times Vannatta would call him to remind him to cover these checks (R. 204-215). The fact that appellant did not have intimate knowledge as to the exact method the irregularities were handled by Vannatta, that is, the placing of the checks in the deferred items account, is immaterial. Appellant knew that he was engaged in irregular practices, else why would he call Vannatta for approval?

As stated in Section 212, 20 Am. Jur.,

“A knowledge of facts may be presumed or inferred under the circumstances of a case. One is presumed to know the truth in regard to facts within his own special means of knowledge, what a reasonable person ought to know from facts brought to his attention and whatever proper inquiry would disclose. The actual existence of a condition for a considerable period of time is presumptive evidence of notice or knowledge of its existence.”

That there was collaboration between appellant and Vannatta is without doubt. Both appellant and Vannatta were constantly in touch with each other by phone.

The trial judge was correct when he found collaboration between the parties.

As stated by the trial judge,

“ . . . The evidence discloses, however, that prior to this check referred to in Count I, Van-

natta and Benchwick (appellant) over a period of some four months had been engaged in the same kind of activity, dealing in that period with some four previous checks held in Deferred Items from 7 to 20 days. I mention this because if a single transaction were involved, or even if the transaction first charged was the first one that occurred, a different situation might be presented than is presented here. We know from the evidence, by the testimony of the defendant Benchwick himself and Vannatta as well, that they were in constant collaboration and cooperation—in fact, they say so themselves—with a view of the bank honoring Benchwick's N.S.F. checks, a fraud on the bank. I don't know how you could have any better evidence of collaboration than we have in this case, because both of the individuals involved say they collaborated constantly, with a view of Benchwick writing N.S.F. checks, which Vannatta would not charge against Benchwick's account, but would hold them for varying periods, sometimes running into almost as much as a month. . . .

“If the first transaction between them, or the first one or two, perhaps, were the only ones involved, it might conceivably be a different matter. But when we see that these two men were frequently telephoning each other back and forth, checking with each other as to the amount of the checks that Benchwick was going to draw and when, consulting with the stock broker, all three together at times, it is ridiculous to suggest there was no collaboration between them. There was very extensive collaboration, if we accept only what Benchwick and Vannatta tell us about it, which probably is the minimum that might be

known of it. That is all that I can judge the case upon, and of course all that I do judge it upon.

“I answer the request for specific findings of fact in each instance in the affirmative. In my judgment the evidence shows beyond a reasonable doubt that each and all of the questions must be answered in the affirmative.”

In considering the sufficiency of the evidence to sustain the verdict, this Court must take that view of the evidence which is most favorable to the Government and must give to the Government the benefit of all the inferences which reasonably may be drawn from the evidence. *United States v. Toner* (D.C.), 77 F. Supp. 908.

The Government, therefore, contends that the evidence was more than sufficient to sustain a finding of guilt.

III

THE DISTRICT COURT PROPERLY CONSIDERED EVIDENCE OF EVENTS SUBSEQUENT TO THE PERIOD OF THE OFFENSES ALLEGED IN THE INFORMATION.

Did the District Court err in admitting evidence of subsequent statements and conduct of appellant?

In criminal prosecutions whenever the intent of the accused is important, as in this case, a somewhat wider range of evidence should be permitted to show intent.

Where intent and knowledge are essential elements of the offense charged, evidence of transactions so con-

nected with the specific offense charged that it tends to show criminal intent or guilty knowledge is admissible. *Coffin v. U.S.*, 162 U.S. 664, 673, 16 S.Ct. 943, 40 L.Ed. 1109; *Moore v. U.S.*, 150 U.S. 57, 14 S.Ct. 26, 33 L.Ed. 996; *Wood v. U.S.*, 16 Pet. 342, 41 U.S. 342, 10 L.Ed. 987; *Strom v. U.S.* (6 Cir.), 12 F.2d 233, 234; *Boone v. U.S.* (8 Cir.), 257 F. 963, 966, 967; *Moffat v. U.S.* (8 Cir.), 232 F. 522, 533; *Galbreath v. U.S.* (6 Cir.), 257 F. 648, 658; *Wolfson v. U.S.* (5 Cir.), 101 F. 430, 433, 434; *Dorsey v. U.S.* (8 Cir.), 101 F. 746, 755, certiorari denied 178 U.S. 613, 20 S.Ct. 1030, 44 L.Ed. 1216.

Where trial is without a jury, it is presumed that the trial judge considered only competent evidence in arriving at his judgment. *Pasadena Research Laboratories v. U.S.*, 169 F.2d 375, certiorari denied 69 S.Ct. 83, 335 U.S. 853, 93 L.Ed. 401. Furthermore, in a trial without a jury, it would be assumed that the Court considered only evidence properly admitted and admissible, and any evidence claimed to be inadmissible is to be regarded as having been harmless, unless it clearly appears that otherwise the findings would have been different. *United States v. David*, 107 F.2d 519.

In cases or prosecution for crimes involving fraudulent intent, some Courts have displayed increasing liberality in admitting evidence of subsequent statements and conduct of a defendant. *Heindel v. U.S.* (6 Cir. 1945), 150 F.2d 493, 497; *United States v. Matot* (2 Cir. 1944), 146 F.2d 197, 198; *United States v. Wicoff* (7 Cir. 1951), 187 F.2d 886, 890-891.

Since intent and knowledge were in issue in this case, a wider range of evidence was permissible and it was within the trial judge's discretion to admit evidence subsequent to the period of the offenses alleged in the information. Even if such evidence was inadmissible, it was harmless and there is no reason to reverse the District Court's findings.

CONCLUSION

The appeal fails to show any grounds sufficient for reversal.

Dated, Honolulu, Hawaii,
September 22, 1961.

Respectfully submitted,

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United States Attorney,

District of Hawaii,

Attorney for Appellee.

No. 17396 ✓

IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

HARVEL H. COSPER AND STELLA COSPER,
Appellants,
vs.
SOUTHERN PACIFIC COMPANY, a corporation,
Appellee

APPELLANTS' OPENING BRIEF

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No. 17396

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HARVEL H. COSPER AND STELLA COSPER,
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APPELLANTS' OPENING BRIEF

STATEMENT OF JURISDICTION

Plaintiffs in their complaint against defendant alleged themselves to be citizens of the State of Arizona and defendant to be a corporation organized and existing under the law of the State of Delaware. The jurisdiction of the court was based on this diversity of citizenship, and the matter in controversy, exclusive of interest and costs, exceeded ten thousand dollars. 28 U.S.C.A. § 1332.

The jurisdiction of the United States Court of Appeals for the Ninth Circuit is based on 28 U.S.C.A. § 1291.

STATEMENT OF THE CASE

Cosper v. Southern Pacific Company is an action for damages and equitable relief arising from appellant's claim that appellee breached an implied contract to maintain ditches and dikes on an easement granted by appellants' predecessors in interest to appellee's predecessors in interest. At the close of the trial by jury the issues were submitted by the trial court to the jury. On the issue of the defense of "act of God" the trial court instructed the jury as follows:

"You are instructed that the defense of an act of God does not relieve the defendant from responsibility for damages resulting from breach of contract, if you find such a breach, but should be considered solely in determining what portion of plaintiffs' damage, if any, was actually caused by the defendant's alleged breach of contract."

The trial court then defined "act of God" and further instructed the jury as follows:

"If the jury find, from the evidence and under these instructions, that defendant was guilty of a breach of contract and that as a result of such breach plaintiffs suffered damage which could have been prevented by defendant's maintenance of the ditches and dikes, then the damage was not produced by an act of God within the meaning of the law."

The jury deliberated for approximately seven hours and then reconvened to request clarification of certain issues by the trial court. In response to a written question, the trial court stated:

"Yes, the question as I interpret it, it's not in the form of a question, is whether or not you could find for the plaintiff but no money for compensation. I take it that you have in mind, or if this is what you have in mind, that you find that there was an obligation to keep the dyke and ditch in repair, and that it was breached but that the plaintiffs were not damaged, could you return a verdict in their favor and give them no money since they had no damages. I take it that's the sense of the question?"

The jury foreman responded:

"Your Honor, our thought behind this was that, through

damage, the damage to the plaintiffs' property was caused by an act uncontrollable by man or an act of God, but there was a moral obligation in the maintenance of the ditches and dykes."

The trial court then instructed the jury as follows:

"Well, let me say that if you found the damage was caused by an act of God, and that it could not have been prevented by the compliance with the contract, then there would be—your verdict would have to be for the defendant. In other words, if the damage was caused by an act of God and it couldn't have been prevented if the defendant had carried out its contract, it would have happened anyway because of the forces of nature, then your verdict would be for the defendant, if that is what you found."

The jury then retired and, after deliberating approximately fifteen minutes, returned a verdict for appellee.

Appellants made a timely motion for a new trial on the grounds that the trial court had committed prejudicial error by erroneously instructing the jury upon their reconvening and instructing the jury in conflict with the trial court's previous instruction on act of God. Appellee resisted appellants motion on the grounds that both instructions were accurate statements of the law and not in conflict and would not be prejudicial error even if conflicting. The trial court denied appellants' motion for new trial and entered judgment upon the verdict.

SPECIFICATIONS OF ERROR

1. Appellant assigns as error to the trial court the following instruction to the jury:

"Well, let me say that if you found that the damage was caused by an act of God, and that it could not have been prevented by the compliance with the contract, then there would be—your verdict would have to be for the defendant. In other words, if the damage was caused by an act of God and it couldn't have been prevented if defendant had carried out its contract, it would have happened anyway because of the forces of nature, then your verdict would be for the defendant, if that is what you found."

for the reason that appellants are entitled to a verdict for nominal damages if the jury finds that appellee breached its contract.

2. Appellant assigns as error to the trial court the conflict between the instruction set out in Specification Number One and the following instruction:

"You are instructed that the defense of an act of God does not relieve the defendant from responsibility for damages resulting from breach of contract, if you find such a breach, but should be considered solely in determining what portion of plaintiffs' damage, if any, was actually caused by the defendant's alleged breach of contract. By the term "act of God" is meant something superhuman—something beyond the power of man to guard against. It means inevitable accident—something that happens without the intervention of man. By the term "act of God" is meant those events and accidents which proceed from natural causes, and cannot be anticipated and guarded against, or resisted. If the Jury find, from the evidence and under these instructions, that defendant was guilty of a breach of contract and that as a result of such breach plaintiffs suffered damage which maintenance of the ditch and dikes, then the damage was not produced by an act of God, within the meaning of the law."

on the grounds that the jury was misled and confused by the conflict.

For convenience, the instruction set forth in Specification of Error No. One shall be referred to hereafter as the "latter instruction." The instruction set forth in Specification of Error No. Two shall be referred to as the "former instruction." The Transcript of Record shall be referred to as "T.R."

SUMMARY OF ARGUMENT

I

Appellants' position is that the latter instruction is an erroneous statement of law for the reason that even if the jury finds that appellants' damage was caused by an act of God, the jury may still find that appellee had breached its contract and return a verdict of nominal damage for appellants. This error was clearly prejudicial because the jury's question to the court was, in substance, asking whether the jury could return a nominal verdict. A verdict of nominal damage in favor of appellants and a judgment entered thereon would be extremely valuable to appellants in this case because it would determine appellants' right to the protection of appellee's ditches and dikes in the future.

II

Appellants' position is that the former instruction is in conflict with the latter instruction, that this conflict is error, and that the verdict of the jury was prejudicially affected thereby. The former instruction, in substance, tells the jury that they are not to consider the defense of an act of God in determining whether the alleged contract existed and whether appellee's had breached that contract, but to consider the defense of an act of God solely in determining what portion of appellants' damage was actually caused by appellee's breach.

The latter instruction tells the jury that if appellants' damage was the result of an act of God, then there is no liability on the part of the appellee. When considered together with the question asked by the jury, as stated by the trial court, at T.R. page 16, the trial court is charging the jury that damage caused by appellee's breach of contract is necessary to sustain a verdict for appellant. We respectfully submit that these two propositions are diametrically opposed and irreconcilably in conflict.

ARGUMENT

I

The law is universally clear that a breach of contract gives rise to a cause of action and that relief shall be granted in the form of a judgment for nominal damages, if no actual damages result from the breach. RESTATEMENT, CONTRACTS, § 328:

"Where a right of action for breach exists, but no harm was caused by the breach, or the amount of harm caused thereby is not substantial or is not so established that compensatory damages will be given under the rule stated in § 329, judgment will be given for nominal damages, a small sum fixed without regard to the amount of harm."

The above rule was stated in *Derby v. Westminster Foundation of Ohio*, 103 N.E. 2d 10, at 12:

"A breach of contract always creates a right of action, but a breach sometimes occurs without causing substantial damages. In such case the plaintiff can recover nominal damages."

In *Hilliard v. Newberry*, 153 N.C. 104, 68 S.E. 1056 the court stated:

" . . . when the obligation amounts to a binding agreement to do or refrain from doing some definite specific thing materially affecting the rights of the parties, an action will presently lie for breach of such an agreement and no damage need be shown."

In order to place the latter instruction in context, the question presented to the court, as stated by the trial court at T.R. page 16 must be considered. There the trial court stated that the question was: if the jury find that there was a contract and that it was breached, but that the plaintiffs were not damaged, could the jury return a verdict in favor of plaintiff for no damages? The jury foreman, at T.R. page 17 clarified the question by stating that the jury's thought was that any damage which in fact existed was caused by an act of God. The trial court then gave the jury the latter instruction which, in substance, told the jury that if the plaintiffs' damages were caused by an act of God and could not

have been prevented by defendant fulfilling its obligation under the contract, then the verdict should be for the defendant. We submit that this instruction, when given in answer to the question presented to the trial court, in unquestionably error.

That the erroneous latter instruction was prejudicial to plaintiff appears on the face of the transcript of record. The jury asked the trial court at T.R. page 16 whether it could find for the plaintiffs with no damages. It can only be assumed that the jury was considering such a verdict. The erroneous latter instruction at T.R. page 17 precludes the jury from considering such a verdict.

A verdict for nominal damages in this case cannot be considered a trivial thing, for a judgment entered on such a verdict would be *res adjudicata* between the appellants and appellee and would fix appellants' right to the future protection of appellee's ditches and dikes.

II

A reading of the former instruction and the latter instruction presents an irreconcilable conflict. The former instruction tells the jury that they are to consider the defense of an act of God solely in determining what portion of appellants' damage was actually caused by appellee's breach if any. The latter instruction tells the jury that appellee incurs no liability in contract if the plaintiff's damage was caused by an act of God. Such a conflict can, and obviously did, only confuse and mislead the jury.

Conflicting instructions are prejudicial error, and almost universally grounds for reversal. *Pipoly v. Benson*, 28 Cal. 2d 366, 125 P 2d 482, 147 A.L.R. 515, *Hoelt v. State*, 221 Iowa 694, 266 N.W. 571, 104 A.L.R. 1008, *Metropolitan Life Ins. Co. v. Alterovitz*, 214 Ind. 186, 14 N.E. 2d 570, 117 A.L.R. 770, *Tyrrell v. Prudential Life Ins. Co.*, 109 Vt. 6, 192 Atl. 184, 115 A.L.R. 392. See also numerous cases cited in American Jurisprudence, Appeal and Error, § 1108.

CONCLUSION

In this case the jury deliberated for approximately seven hours without reaching a verdict and then reconvened to seek clarification of certain issues. At this time the latter instruction, assigned as error, was given. The jury retired and, in less than fifteen minutes, reached the verdict they could not agree upon in the previous seven hours. This leads to the inescapable conclusion that the latter instruction given the jury eliminated the theory upon which the jury was considering a verdict for plaintiff. The foreman's comments at T.R. pages 16 and 17 substantiate this. Had the jury been correctly instructed upon the law when they reconvened, there is little doubt that the outcome of the trial would have been different.

The prejudicial errors committed by the trial court can only be corrected by the reversal of the judgment and the trial court's order denying appellant's motion for a new trial and remanding this case with the direction that a new trial be had.

Respectfully submitted

ROGGE, ROGGE & STARK

Attorneys for Appellants

HARVEL H. COSPER and STELLA COSPER

No. 17396

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

HARVEL H. COSPER AND STELLA COSPER,

Appellants,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation,

Appellee

APPELLEE'S ANSWERING BRIEF

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APPELLEE'S ANSWERING BRIEF

FOREWORD

Counsel for Harvel H. Cospers and Stella Cospers, Appellants herein, and counsel for Southern Pacific Company, Appellee herein, have agreed, pursuant to Rule 76 of the Federal Rules of Civil Procedure, on a statement of this case which is found in Appellants' Opening Brief and the Transcript of Record. (TR. pp. 3 and 4)

This appeal results from the trial court giving the following instruction, which shall hereinafter be referred to as "Contested Instruction":

"Well, let me say that if you found that the damage was caused by an act of God, and that it could not have been prevented by the compliance with the contract, then there would be — your verdict would have to be for the defendant. In other words, if the damage was caused by an act of God and it couldn't have been prevented if the defendant had carried out its contract, it would have happened anyway because of the forces of nature, then your verdict would be for the defendant, if that is what you found."

Appellee contends:

(a) That the "Contested Instruction" is an accurate statement of the law and is not in conflict with Modified Plaintiffs' Instruction No. 6. (TR. pp. 8 and 9)

(b) That on appeal, Appellants cannot assign as error the "Contested Instruction," since they failed to make a timely objection to it before the jury retired to deliberate its verdict.

ARGUMENT

(A)

If the Appellants are correct and the Restatement of Contracts, Section 328, cited by them is the general rule, we believe this case falls within the exception to the general rule.

The Appellants assume as a fact that the easements, dated June 6, 1935, and November 5, 1937, (TR. p. 5) imply that Appellee had a duty to maintain the dikes and ditches in question, whether or not it was physically possible to do so. We submit, this is not the law. In the case of *Faria v. Southwick*, 1959, 81 Idaho 68, 337 P. 2d 374, plaintiff and defendant entered into a contract with respect to a piece of land which both believed to be fertile and productive, when in fact that land was alkaline and unproductive. Citing a Maryland case, the Idaho Court stated the exception to the general rule:

“* * * Where parties enter into a contract upon the common assumption that a particular and essential state of things exists with reference to a substantial subject-matter, the nonexistence of that state of things, through default of neither party, ends the liability and prevents the accrual of a duty dependent upon it. * * *

“Restatement of Contracts, volume 2, p. 847, states that with certain exceptions not applicable here

“* * * a promise imposes no duty if performance of the promise is impossible because of facts existing when the promise is made of which the promisor neither knows nor has reason to know.’”

We submit that, in applying reason to this case, the jury assumed that the original contracting parties did not foresee the possibility of an unprecedented storm. Furthermore, under the Court's instructions, which are not assigned as error, the jury found from the evidence that the unprecedented storm, being an act of God, was the sole cause of Appellants' injury. Since the sole cause of Appellants' injury was an act of God and not the result of any breach on the part of Appellee, Appellants cannot recover damages in any amount. *Reddick v. McAllister Lighterage Line, Inc.*, 1958, 258 F. 2d 297.

As an illustration of this point, we call the Court's attention to the case of *Barnard-Curtiss Company v. United States*, 1958, 257 F. 2d 565, decided by the U. S. Court of Appeals, 10th Circuit. In the *Barnard* case, the subcontractor contracted with the prime contractor to complete certain work by December, 1954. Work was continuing in May, 1955, when an unprecedented storm caused a flood which severely damaged the project structures. When the subcontractor sued, the prime contractor counter-claimed on the basis that the subcontractor failed to complete on time. The Court of Appeals held that:

"The May 17-18 flood was an unprecedented and extraordinary occurrence of unusual proportions and could not reasonably have been foreseen by the parties. The trial court properly found that it was an 'Act of God.' No recovery may be had from the consequences of the action of natural causes in connection with a breach of contract unless such consequences can be said to have been within the contemplation of the parties at the time of the making of the contract as a probable result of the breach. The damages

arising from the flood did not arise in the usual course of things from the failure to complete on time and were not in the contemplation of the parties at the time they made their contract. As they were not foreseeable consequences of the breach, no recovery can be had on account of damages caused by the flood.”

Whether the holding in the *Barnard* case is the exception to the rule or the modern general rule, the reasoning behind it is sound and just. Since the facts in the *Barnard* case and the instant case are parallel, we see no reason why the “Contested Instruction” should be found erroneous. Furthermore, we believe that the “Contested Instruction” is merely an elaboration of the Court’s Instruction No. 5. (TR. p. 8)

(B)

In the case of *Bercut et al v. Park, Benziger & Co., Inc.*, 1945, F. 2d 731, it was contended that the Lower Court erred in failing to instruct the jury as a matter of law regarding an element of damages. This Court refused to consider the specification of error for several reasons, one of which was that “there was no timely request for an instruction of the character discussed nor timely objection to the Court’s omission so to advise the jury.” As authority for its holding, this Court cited Rule 51 of the Federal Rules of Civil Procedure, which reads as follows:

“Rule 51. Instructions to Jury:
Objection

“At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth

in the requests. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. *No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection.* Opportunity shall be given to make the objection out of the hearing of the jury.” (Emphasis ours.)

The purpose of Rule 51 is to advise the trial judge as to a single and precise point in which he has erred in law so that he may reconsider his ruling and, if convinced of error, so instruct the jury prior to its deliberation. This Rule serves to prevent injustice and mistrial due to inadvertent errors. See *Howland et al v. Beck*, 1932, 56 F. 2d 35.

Although the Appellants contend that the “Contested Instruction” is incorrect, they raise no objection to the other instructions. It is a well settled rule that instructions must be construed together as a whole and, if and when so considered, they properly state the law, it is sufficient.

The Court should not, as stated, in *Louisville and Nashville Railroad Company v. Farmer*, 220 F. 2d 90, rehearing denied, 224 F. 2d 599, as grounds for reversal, lift “a single inconsistent and incorrect paragraph from the context of a well-rounded charge, correct when viewed in its entirety.”

Since a reading of the instructions contained in the transcript indicates that the trial Court correctly charged the jury, a new trial should not be granted merely because a certain instruction, standing alone,

might possibly bear an interpretation which is prejudicial to the Appellee, when the other instructions and charge to the jury appear to be a fair statement of law. See *Gleeson v. Virginia Midland Railway Company*, 5 Mackey 356, 16 D. C. 356, reversed 1891, 11 S. Ct. 859, 140 U. S. 435, 35 L.Ed. 458.

In this case, as shown by the transcript, the Appellants failed to object to the Trial Court's giving the "Contested Instruction" before the jury retired. This Court and other Appellate Courts have stated repeatedly that a party cannot assign as error on appeal an instruction to which no objection was raised at the time of trial.

In the case of *O'Malley v. Cover*, 221 F. 2d 156, the Appellate Court pointed out that it has power to review *only* questions of law regarding instructions to the jury which are properly preserved for review and that it does not have the power to try or re-try cases.

In *United Verde Extension Mining Co. v. Koso*, 1921, 273 F. 369, where it was alleged that the trial court erred in its instructions, this Court held that no exception having been taken to the part of the charge covering the subject of damages, the defendant could not complain that it had been prejudiced.

CONCLUSION

Since the decided cases and Rule 51 of the Federal Rules of Civil Procedure provide that a party must object to the instructions prior to the jury's retiring, we urge that Appellants' failure to timely object, precludes the Appellants from assigning the giving of the "Contested Instruction" as error.

The judgment of the trial Court should be affirmed.

Respectfully submitted,
BOYLE, BILBY, THOMPSON & SHOENHAIR
RICHARD B. EVANS
B. G. THOMPSON, JR.
Attorneys for Appellee
SOUTHERN PACIFIC COMPANY

Three copies of the within Appellee's Answering Brief received this _____ day of October, 1961.

ROGGE, ROGGE & STARK

By _____
405 Arizona Land Title Building
Tucson, Arizona.
Attorneys for Appellants

[illegible]

United States Court of Appeals

Appellants,

SOUTHERN PACIFIC COMPANY, a corporation,

Appellee

405 ARIZONA LAND TITLE BUILDING

Attorneys for Appellants

FILED

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No. 17396

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

HARVEL H. COSPER AND STELLA COSPER,

Appellants,

vs.

SOUTHERN PACIFIC COMPANY, a corporation,

Appellee

APPELLANTS' REPLY BRIEF

STATUTES PRESENTED

Rule 30, Federal Rules of Criminal Procedure

Rule 51, Federal Rules of Civil Procedure

"At the close of the evidence or at such earlier time during the trial as the court reasonably directs any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to adverse parties. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury."

REPLY ARGUMENT

REPLY TO APPELLEE'S ARGUMENT (A)

Appellee cites numerous cases, some of which stand for the proposition that impossibility by reason of an act of God or some other cause is an excuse for non-performance of a contract. Appellants submit that the "Contested Instruction", as defined in Appellee's Answering Brief, is not an instruction on that issue at all. The trial court clearly stated that the question before it was whether the jury could return a verdict in favor of plaintiff with no money damages if the jury found that defendants had an obligation to keep the dike and ditch in repair, that it was breached, but that the plaintiffs were not damaged. (TR p. 16) The jury foreman, in clarification, stated that TR p. 17 that even though damage, the damage was caused by an act of God, but the jury found that there was an obligation to maintain the ditches and dikes. In answer to this question the contested instruction was given. In this context, then, the contested instruction is clearly an erroneous statement of law in that it charges the jury that if there was a contract and that contract is breached, but the damage claimed is caused by an act of God, then the jury may not give the plaintiff a nominal verdict for that breach, but must return a verdict for defendant. Appellants respectfully submit that the case cited in Appellants' Opening Brief adequately established that the correct rule of law is that a breach of contract always gives rise to a claim for relief with or without damage, and if no damage, plaintiff is entitled to a nominal verdict.

REPLY TO APPELLEE'S ARGUMENT (B)

Appellee cites Rule 51 of the Federal Rules of Civil Procedure and claim that Appellants cannot assign the contested instruction as error because the record does not indicate an objection by Appellants to preserve the question for review. Appellants respectfully submit that this is not the law and refer the Court

to the last sentence of Rule 51 of the Federal Rules of Civil Procedure: "Opportunity shall be given to make the objection out of the hearing of the jury." In *Schaffer v. United States*, 221 F. 2d. 17 the Court, in construing Rule 30 of the Federal Rules of Criminal Procedure, which is indential to Rule 51 of the Federal Rules of Civil Procedure, stated at p. 22:

The government insists that such specifications of error are not properly before this Court because Counsel failed to make their objections before the jury retired to consider its verdict as required by Rule 30 of the Federal Rules of Criminal Procedure.

The Court concluded its charge to the jury with the statement, "All right, you may retire", whereupon the jury retired. Defendant's Counsel then stated to the Court that they desired to make certain objections and the Court replied, "You may state it right now." Whereupon the objections hereinafter considered were fully stated. Unless the Court understood that by giving Counsel permission to state their objections after the jury retired, it might even then recall the jury for any necessary correction of the charge, it did not observe the duty imposed upon it by the last sentence of Rule 30, *supra*, "Opportunity shall be given to make the objection out of the hearing of the jury." We agree with what Chief Judge Parker of the Fourth Circuit said in *Lovely v. United States*, 169 F. 2d 386, 391, that

"... Counsel should not be required in the presence of the jury to place themselves in the attitude of apparent antagonism to the trial judge which is involved in excepting to the charge."

In accord with *Schaffer v. United States*, *supra*, and *Lovely v. United States*, 169 F. 2d 386, is *Bostwick v. United States*, 218 F. 2d 790 and in the *Bostwick* case the Court refers to Rule 51, Federal Rules of Civil Procedure, as well. The partial transcript contained in TR Pp. 14-17 clearly indicates that the Court provided no opportunity for Counsel to object to its charge to the jury:

"The Court: Very well, Have I answered the questions that you had now?

The Foreman: Yes, your Honor, you have.

The Court: Well then, supposing you retire then and continue your deliberations.

Counsel for Appellants did object in chambers, but, of course, the record cannot indicate this. It will also be noted at TR p. 4 that the jury returned a verdict within 15 minutes after retiring. Appellants submit that Rule 51 must be interpreted to excuse the failure to object as there was no opportunity given to object and there was no opportunity given to make the objection out of the hearing of the jury before the jury retired.

CONCLUSION

It is clear that the contested instruction is an erroneous statement of the law, when considered in proper context and that under the circumstances shown on the face of the record Appellants are excused from demonstrating by the record that an objection was made to the Court concerning the contested instruction.

WHEREFORE Appellants again respectfully urge that the errors committed by the trial court can only be corrected by the reversal of the judgment and the trial court's order denying Appellants' motion for a new trial and remanding this case with the direction that a new trial be had.

Respectfully submitted,
ROGGE, ROGGE & STARK
Attorney for Appellants
Harvel H. Cosper and
Stella Cosper

No. 17396

United States
Court of Appeals
for the Ninth Circuit

HARVEL H. COSPER AND STELLA COSPER,
Appellants,

vs.

SOUTHERN PACIFIC COMPANY, a corpora-
tion,

Appellee.

Transcript of Record

Appeal from the United States District Court for the
District of Arizona

No. 17396

United States
Court of Appeals
for the Ninth Circuit

HARVEL H. COSPER AND STELLA COSPER,
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Appeal from the United States District Court for the
District of Arizona

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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Attorneys for Appellee.

In the United States District Court
For the District of Arizona

No. Civ-123 Globe

HARVEL H. COSPER and STELLA
COSPER, Husband and Wife, Plaintiffs,

vs.

THE SOUTHERN PACIFIC COMPANY,
a corporation, Defendant.

AGREED STATEMENT

The following agreed statement is presented by the parties in lieu of record on appeal, and is submitted pursuant to Rule 76 of the Federal Rules of Civil Procedure.

Statement of the Facts

Cosper v. The Southern Pacific Company is an action for damages and equitable relief arising from plaintiffs' claim that defendant breached an implied contract to maintain ditches and dikes on an easement granted by plaintiffs' predecessors in interest to defendant's predecessors in interest. Evidence was adduced at trial by jury and the issues were submitted by the Court to the jury with the instructions which are set out in full as Appendix A to the Statement of Facts. The jury deliberated for approximately seven hours, and at 11:10 P.M. requested clarification from the Court on certain

issues. A portion of the trial transcript covering the proceedings during the time the jury was reconvened is set out in Appendix B to the Statement of Facts. The jury then retired and, after deliberating approximately fifteen minutes, returned a verdict for defendant.

Plaintiffs made a timely motion under Rule 59 of the Federal Rules of Civil Procedure for a new trial on the grounds that the Court committed prejudicial error by instructing the jury, upon their reconvening, in conflict with the Court's previous instruction on the defense of Act of God. The portion of Appendix B from page two, line seventeen to page three, line seven was alleged by plaintiffs to be in conflict with Modified Plaintiffs' Instruction No. 6 on page 7 of Appendix A. Defendant resisted plaintiffs' motion asserting that the instructions were not conflicting and were both accurate statements of the law of the case and would not be prejudicial error even if conflicting. The Court denied plaintiffs' motion for a new trial.

ROGGE & ROGGE,

/s/ By H. EARL ROGGE, JR.

Attorneys for Plaintiffs, Appellants.

BOYLE, BILBY, THOMPSON
and SHOENHAIR,

/s/ By RICHARD B. EVANS,

Attorneys for Defendant, Appellee.

The foregoing statement, including Appendixes A, B and C, and the attached copies of the Judgment and Notice of Appeal is approved and it is directed that it be certified to the United States Court of Appeals for the Ninth Circuit as the record on appeal of the plaintiffs.

Dated this 6th day of May, 1961.

/s/ JAMES A. WALSH.

APPENDIX A

JURY INSTRUCTIONS

Court's Instruction No. 1

The plaintiffs contend in this case that while the easements dated June 6, 1935 and November 5, 1937, which are in evidence as a part of plaintiffs' Exhibit No. 9, do not contain an express agreement on the part of the grantee, El Paso & Southwestern Railway Company to maintain and keep in repair the ditch and dike involved in this action, nevertheless an implied term and agreement of the easements obligated El Paso & Southwestern Railway Company, and consequently the defendant, to so maintain and keep in repair the ditch and dike.

It is defendant's position that no such agreement on the part of El Paso & Southwestern Railway Company may be implied from the language employed in the easements and, accordingly, neither defendant nor its predecessor, El Paso & South-

western Railway Company, was obligated to maintain and keep in repair the dike and ditch.

You are instructed that a contract between parties includes not only what is expressly stated therein but also what is necessarily to be implied from the language used. In the absence of an express provision therefor, the law will imply an agreement between parties to a contract to do and perform those things that according to reason and justice they should do in order to carry out the purpose for which the contract was made.

If, from a consideration of the language employed in the easements dated June 6, 1935 and November 5, 1937, and applying reason and justice thereto, you find that in order to effectuate and carry out the intention which the parties to the easements had at the time when the easements were given by the grantors and accepted by the grantees, there must be implied an agreement on the part of El Paso & Southwestern Railway Company to maintain and keep in repair the ditch and dike involved in this case, then you may find that the El Paso & Southwestern Railway Company did contract and agree to maintain and keep in repair the dike and ditch and that defendant was bound to perform such contract and agreement made by its predecessor.

In the event you do not find it necessary in order to effectuate the intention of the parties to the easements to imply such a contract and agreement on the part of El Paso & Southwestern Railway Com-

pany, then the defendant is not bound to maintain the ditch and dike and keep them in repair and plaintiffs may not recover in this action.

Court's Instruction No. 2

I instruct you that so far as the issue of damages is concerned in this case, you are limited to considering only whether the plaintiffs have suffered a loss of use of their lands, since plaintiffs may not in this case recover damages for any other loss or injury.

Court's Instruction No. 3

Before plaintiffs are entitled to recover any damages on their complaint, they have the burden of proving by a preponderance of the evidence that: (1) The defendant, as successor to El Paso & Southwestern Railway Company, contracted and agreed to maintain and keep in repair the ditch and dike involved in this action; (2) that the defendant breached such contract; and (3) plaintiffs suffered damages naturally resulting from such breach. If plaintiffs have failed to prove by a preponderance of the evidence any of the foregoing requirements, then your verdict should be for the defendant.

Court's Instruction No. 4

I instruct you that you must find from the evidence in this case that plaintiffs are now and have been since before May 3, 1956 the owners of the

55 acres of land in relation to which they claim damages in this action.

Court's Instruction No. 5

I instruct you that even though you find from the evidence and under these instructions that the defendant had the contract obligation to maintain and keep in repair the dike and ditch constructed by El Paso & Southwestern Railway Company on plaintiffs' property, if you find further from a preponderance of the evidence that defendant's maintenance of the dike and ditch in full compliance with its obligation would not have protected the lands of plaintiffs from surface flood waters at times when the same are subject to being flooded by heavy rainfall upon the watershed draining toward and upon said lands, then in such event the defendant had the right to abandon the maintenance of the dike and ditch upon plaintiffs' land and to seek other methods of accomplishing the protection of plaintiffs' land from flood waters which was intended by the construction of the dike and ditch upon plaintiffs' land.

Modified Plaintiffs' Requested Instruction No. 6

You are instructed that the defense of an act of God does not relieve the defendant from responsibility for damages resulting from breach of contract, if you find such a breach, but should be considered solely in determining what portion of plaintiffs' damage, if any, was actually caused by the

defendant's alleged breach of contract.

By the term "act of God" is meant something superhuman—something beyond the power of man to guard against. It means inevitable accident—something that happens without the intervention of man.

By the term "act of God" is meant those events and accidents which proceed from natural causes, and cannot be anticipated and guarded against, or resisted.

If the Jury find, from the evidence and under these instructions, that defendant was guilty of a breach of contract and that as a result of such breach plaintiffs suffered damage which could have been prevented by defendant's maintenance of the ditch and dikes, then the damage was not produced by an act of God, within the meaning of the law.

Modified Plaintiffs' Requested Instruction No. 7

Upon the allegations of the plaintiffs' complaint, therefore, you are instructed that in order to recover herein upon their complaint the burden is upon the plaintiffs to prove affirmatively the allegations of their complaint by a preponderance of the evidence as just defined. Likewise, the burden is upon the defendant to prove the allegations of its affirmative defense or defenses by a preponderance of the evidence. But this does not mean that the party upon whom such a burden rests must produce the witnesses by whom the burden is borne.

The burden may be sustained by the evidence, whether given by a party's own witnesses or those of his adversary, either on direct or cross-examination.

Plaintiffs' Requested Instruction No. 9

The agreements in evidence in this action contain covenants by the plaintiffs to save the defendant harmless from any damage which might occur from defendant's construction and maintenance of the dikes and ditches. The Jury is instructed to carefully scrutinize these covenants to determine what the parties actually intended. I further instruct you that clauses of this type are to be strictly construed, that is, the words are to be taken to mean only what they say, nothing more.

Modified Plaintiffs' Requested Instruction No. 10

If the Jury finds that the "save harmless" clause was not intended by the parties to the easements to exempt the defendant and its predecessor from liability for intentional failure to maintain the dikes and ditches, then such clause would not relieve defendant from liability if you find from the evidence and under these instructions that defendant did have a contract obligation to maintain and keep in repair the ditches and dikes and that it breached such contract.

Modified Plaintiffs' Requested Instruction No. 12

In the event you find a verdict in favor of the plaintiffs and the defendant, then if you find further from a preponderance of the evidence that as a natural result of the breach by defendant of the agreement to maintain and repair the dike and ditch, plaintiffs suffered, after May 3, 1956, and before February 1, 1960, the loss of use of some of their lands, then you may award plaintiffs the fair and reasonable value, as shown by the evidence, of the loss of use of such lands.

I instruct you that the use value of the land is the fair and reasonable value, as shown by a preponderance of evidence, the plaintiffs would have derived from its actual use during the period in question.

Modified Plaintiffs' Requested Instruction No. 13

You are instructed that if you find from a preponderance of the evidence and under these instructions, that El Paso & Southwestern Railway Company did contract and agree to maintain and keep in repair the ditch and dike involved in this case, as alleged by plaintiffs, and if you find further that the defendant has failed or refused to maintain and keep in repair the dike and ditch, and that as a natural result of such failure or refusal plaintiffs have suffered damage, then your verdict shall be in favor of the plaintiffs.

Modified Defendant's Requested Instruction No. 1

Where a party is entitled to the benefit of a con-

tract and can save himself from loss arising from a breach thereof by the making of reasonable expenditures or with reasonable exertions, it is his duty to do so, and he can charge the party in default with such damages only as with reasonable endeavors and expense he could not prevent.

Modified Defendant's Requested Instruction No. 4

The damages to which one party to a contract is entitled because of a breach thereof by the other are such as arise naturally from the breach itself, or such as may reasonably be supposed to have been within the contemplation of the parties at the time of making the contract as a probable result thereof. Conversely, damages which do not arise naturally from a breach of the contract, or which are not within the reasonable contemplation of the parties, are not recoverable.

Defendant's Requested Instruction No. 7

You are instructed that in no event are plaintiffs entitled to recover from defendant for damages, if any, done to plaintiffs lands lying in the SE $\frac{1}{4}$ of Sec. 19, Township 6 South, Range 31 East, G. & S. R. B. & M., Greenlee County, Arizona, more particularly described as follows:

Beginning at the northwest corner of the Southeast quarter of said Section 19; thence South 45° 50' East 197.0 feet to point of beginning of property to be described; thence South 86° 01' East,

a distance of 504.0 feet to a point; thence South $14^{\circ} 08'$ West a distance of 987.5 feet to a point; thence North $86^{\circ} 01'$ West a distance of 330.0 feet to a point; thence North $3^{\circ} 59'$ East along the easterly right of way line of the Arizona and New Mexico Railway Company a distance of 972.0 feet to a point of beginning,

for the reason that plaintiffs' predecessors in title to the above described land granted to the defendant on September 2, 1930, a right of way for the purpose of passing flood and drainage waters over the said land.

Defendant's Requested Instruction No. 8

You have been instructed on the subject of the measure of damages in this action because it is my duty to instruct you as to all the law that may become pertinent in your deliberations. I, of course, do not know whether you will need the instructions on damages, and the fact that they have been given to you must not be considered as intimating any view of my own on the issue of liability or as to which party is entitled to your verdict.

Modified Defendant's Requested Instruction No. 11

In your consideration of this case, and in determining whether or not damages are to be given, you must not permit yourselves to be influenced in the slightest degree by any emotion or feeling of charity or sympathy. Such feelings and emotions, however proper in themselves, have no just place in the con-

sideration by you of a case of this kind. In making your determination in this case, you cannot in any measure substitute prejudices or feelings or sympathies or passions for the evidence, as the basis of an award. Nor can you make a finding against a party based on mere guess, speculation or conjecture. You must make your determination only upon a consideration of the evidence before you, and the instructions which have been given to you by the court.

Defendant's Requested Instruction No. 12

In your consideration and determination of this case you must treat it as litigation between persons of equal standing in the community. Your determination should not be affected in any way by reason of the fact that one of the defendants is a railroad or a corporation, nor should you be in any way influenced, one way or the other, by any thoughts or ideas you may have as to the financial standing of any party to this litigation. Such matters have no proper place in the consideration of a case of this kind. This case is to be considered and determined by you just as you would consider and determine any litigation between private individuals.

APPENDIX B

Partial Transcript

11:10 P.M.

The Court: Mr. Foreman, I understand the jury has a question about an exhibit that is in the case?

The Foreman: Yes, your Honor, we have.

The Court: Will you state it?

The Foreman: It is the stated ruling on right-of-way maintenance by the dominant possessor versus the subservient possessor. The question is whether we should use that interpretation from another State as a fact in this State, or whether we should not.

The Court: Let the record show that the Foreman is referring to Plaintiff's Exhibit 11 in evidence. And I take it this quotation from the case?

The Foreman: Yes, your Honor.

The Court: No, that has no force with you. The only law that you will apply in this case is the law that I gave you in the instructions. This is just somebody's quotation from a Washington case, and you are not to regard it as a matter of law. The only law that you will consider is the law that I gave you in the instructions.

The Foreman: Very well, sir. Your Honor, there is one other question we have. The agreement of 1937 and your instructions we are a little hazy as to whether the agreement is binding in its actual writing or in its actual writing and its implied writing.

The Court: Well, if you find an implied agreement in that easement, then it is the same as if it was expressed in there. Your question with regard to the easement is from an examination, a consideration of the terms and the provisions of that easement, the express terms, do you find that, using reason and a sense of justice, that you must imply an

agreement to maintain and keep in repair the dyke and ditch in order to make effective the intention which the parties on that agreement had when they made it. If you do find that, then there would be an implied term or agreement in the easement. If you don't find it, if you don't find that that is necessary in order to effectuate the intention of the parties when they made the written agreement, then of course there is no implied agreement. That is what you will determine.

The Foreman: Yes, sir.

The Court: If you do find an implied agreement, then it's as binding as if it was expressed. Of course if you don't find one, then there is none. Does that cover it?

The Foreman: Yes, your Honor, I believe that answers the question.

Your Honor, did you get the slip of paper from the Bailiff with another question on it?

The Court: Yes, the question as I interpret it, it's not in the form of a question, is whether or not you could find for the plaintiff but no money for compensation. I take it that you have in mind, or if this what you have in mind, that you find that there was an obligation to keep the dyke and ditch in repair, and that it was breached but that the plaintiffs were not damaged, could you return a verdict in their favor and give them no money since they had no damages. I take it that's the sense of the question?

The Foreman: Your Honor, our thought behind this was that, through damage, the damage to the plaintiffs' property was caused by an act uncontrollable by man or an act of God, but there was a moral obligation in the maintenance of the ditches and dykes.

The Court: Well, let me say that if you found that the damage was caused by an act of God, and that it could not have been prevented by the compliance with the contract, then there would be—your verdict would have to be for the defendant. In other words, if the damage was caused by an act of God and it couldn't have been prevented if the defendant had carried out its contract, it would have happened anyway because of the forces of nature, then your verdict would be for the defendant, if that is what you found.

The Foreman: The thought behind it, your Honor, was that actually we have not reached a unanimous agreement, but these points and questions were the ones that we felt were separating us from a unanimous agreement.

The Court: Very well, Have I answered the questions that you had now?

The Foreman: Yes, your Honor, you have.

The Court: Well then, supposing you retire then and continue your deliberations.

The Foreman: Thank you, your Honor.

APPENDIX C

APPELLANTS' STATEMENT OF POINTS

1. "Act of God" is not a defense to a claim for breach of contract, but merely goes to the cause of the damage.

2. The instruction on "Act of God" as set out in Appendix B is an erroneous statement of the law of the case and in conflict with the earlier instruction given as set out in Appendix A.

3. Conflicting instructions on a material issue constitute reversible error.

4. The Court's error was obviously prejudicial to appellants' cause for the following reasons:

(A) All of the questions asked by the jury as reported in Appendix B were answered favorably to appellant, except the answer to the jury's question on "Act of God," which was answered favorably to appellee.

(B) The jury returned a verdict almost immediately after retiring for the second time, although they had deliberated for almost seven hours before the erroneous instruction was given.

5. The foreman's comments indicate that the jury may well have brought in a verdict for the plaintiff for nominal damages had they been correctly instructed.

6. A verdict for nominal damages may have moved the Trial Court to grant the equitable relief which plaintiffs sought.

7. The prejudicial error committed by the Trial

Court can only be corrected by the reversal of the judgment and Trial Court's order denying appellants' motion for a new trial and remanding this case with the direction that a new trial be ordered.

[Endorsed]: Filed May 6, 1961.

[Title of District Court and Cause.]

DOCKET ENTRY

Date

1960

* * * * *

1961

* * * * *

Jan. 12—Enter judgment in favor of the defendant, The Southern Pacific Company, and against the plaintiffs, Harvel H. Cosper and Stella Cosper, husband and wife; that plaintiffs take nothing by their complaint and that defendant have its costs.

* * * * *

Certification Attached.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Harvel H. Cospers and Stella Cospers, plaintiffs above named, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the Order denying plaintiff's motion for a new trial entered in this action on February 1, 1961.

ROGGE & ROGGE,

By H. E. ROGGE, JR.

Attorneys for Appellants, Har-
vel H. and Stella Cospers.

Notice of Mailing Attached.

[Endorsed]: Filed March 3, 1961.

[Title of District Court and Cause.]

CLERK'S CERTIFICATE TO RECORD ON APPEAL

United States of America

District of Arizona—ss:

I, Wm. H. Loveless, Clerk of the United States District Court for the District of Arizona, do hereby certify that I am the custodian of the records, papers and files of the said Court including the records, papers and files in the case of Harvel H. Cospers and Stella Cospers, husband and wife, Plaintiffs, vs. The Southern Pacific Company, a corporation, Defendant, numbered Civil-123 Globe, on the docket of said Court.

I further certify that the attached and original documents bearing the endorsements of filing thereon are the original documents filed in said case, and that the attached and foregoing docket entry showing entry of judgment and copy of Notice of Appeal are true and correct copies of the originals thereof remaining in my office in the City of Tucson. I further certify that said original documents and said copies of the civil docket entry and of the Notice of Appeal constitute the entire record on appeal in said case pursuant to Agreed Statement submitted in accordance with Rule 76 of the Federal Rules of Civil Procedure and approved by the District Court, and the same are as follows, to-wit:

1. Agreed Statement, approved by the District Court and filed on May 6, 1961

2. Appendix A, Jury Instructions, filed on May 6, 1961

3. Appendix B, Partial Transcript, filed on May 6, 1961

4. Appendix C, Statement of Points, filed on May 6, 1961

5. Certified copy of the Notice of Appeal, filed on May 6, 1961, and certified copy of the civil docket entry of January 12, 1961, entered in the Civil Docket on January 12, 1961

Witness my hand and the seal of this Court this 24th day of May, 1961.

[Seal] WM. H. LOVELESS,
Clerk,

/s/ By ERMELIA COLE,
Deputy Clerk.

[Endorsed]: No. 17396. United States Court of Appeals for the Ninth Circuit. Harvel H. Cospers and Stella Cospers, Appellants, vs. Southern Pacific Company, a corporation, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Arizona.

Filed May 25, 1961.

Docketed June 6, 1961.

/s/ FRANK H. SCHMID,

Clerk of the United States Court of Appeals for
the Ninth Circuit.

ROGGE & ROGGE

Attorneys at Law

209 Arizona Land Title Bldg.

Tucson, Arizona

July 24, 1961

Mr. Frank H. Schmid, Clerk

U. S. Court of Appeals

9th Circuit

San Francisco 1, California

Re: Cosper v Southern

Pacific Co., #17396

Dear Sir:

I received your letter concerning the statement of points and designation of record. I requested that you send me a copy of the Rules of Court in my letter of June 1, 1961. If you will comply with my request I may be better able to clear up whatever problems exist.

I call your attention to the fact that the record certified to you by the District Court is an agreed statement submitted in accordance with Rule 76 of the Federal Rules of Civil Procedure. This record shall constitute the entire record on appeal. The record contains a statement of points which we adopt as our statement of points on appeal.

24 *Harvel H. and Stella Cospers vs.*

I thank you in advance for your prompt attention to this matter and particularly the mailing of a copy of the Rules of Court.

Very truly yours,

ROGGE, ROGGE & STARK,
/s/ THOMAS A. STARK.

TAS:m

[Endorsed]: Filed July 27, 1961. Frank H. Schmid, Clerk.

No. 17398✓

In the
United States Court of Appeals
For the Ninth Circuit

NEW YORK LIFE INSURANCE COMPANY,
a corporation,

Appellant,

vs.

JOYCE A. HARRINGTON,

Appellee.

Brief for Appellant

MORRIS M. DOYLE
RICHARD MURRAY
McCUTCHEN, DOYLE, BROWN & ENERSEN

1500 Balfour Building
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No. 17398

In the
United States Court of Appeals
For the Ninth Circuit

NEW YORK LIFE INSURANCE COMPANY,
a corporation,

Appellant,

vs.

JOYCE A. HARRINGTON,

Appellee.

Brief for Appellant

This is an appeal from a judgment of the United States District Court for the Northern District of California in favor of the plaintiff and appellee, Joyce A. Harrington. Judgment was entered after a trial before the court. The action is for double indemnity benefits under two policies of insurance issued by appellant, New York Life Insurance Company, to Arnold Harrington, the deceased husband of appellee, as insured. The single indemnity life insurance benefits under the policies were paid without contest, and there is no dispute concerning those benefits. The sole ques-

tion for decision below was whether the death of Arnold Harrington "resulted directly, and independently of all other causes, from accidental bodily injury * * *" within the meaning of the double indemnity provisions of the policies. The evidence is undisputed that Mr. Harrington, an expert with firearms, voluntarily placed a fully loaded Mauser automatic pistol, which he knew to be loaded, to his head and discharged the fatal shot. Appellee contends and the District Court found that the insured relied upon the safety mechanism of the gun and that the discharge of the gun was therefore unintended. Under the rule of the cases, this finding was immaterial. For whatever his hope or expectation, it is apparent that Mr. Harrington voluntarily and needlessly performed an act so dangerous to human life that death followed as a foreseeable consequence. In these circumstances, it is settled that death was not accidental and that appellant was and is entitled to judgment as a matter of law.

JURISDICTION

The Court below had jurisdiction of this action under the provisions of 28 U.S.C., Sections 1332 and 1441(a) (R. 3-4, 5-7).^{*} This Court has jurisdiction of this appeal under the provisions of 28 U.S.C., Section 1291.

STATEMENT OF THE CASE

On February 5, 1960, the date of his death (R. 194), Arnold Harrington, a native of Iowa, was a chief laboratory technician by occupation (R. 72-73) and was thirty-eight years old (R. 194). He had been married to Mrs. Harrington.

^{*}The references in this brief to the printed record are thus: (R. 100); the references to the exhibits are thus: (Ex. 6, p. 3). The parties have stipulated and this Court has ordered that the exhibits need not be printed and the Court may consider them in their original form (R. 304).

ton, a Chinese (R. 68), since 1947 (R. 69). The couple met in Shanghai (R. 69) while the insured, a First Class Pharmacist's Mate, was in charge of the naval laboratory in that city at which Mrs. Harrington was employed (R. 68-69). Mr. Harrington had been married once before (R. 68). The prior marriage was a brief one, having been terminated within a period of several months (R. 68).

Shortly after their marriage in 1947, the Harringtons moved to the Bay Area and, except for short intervals, have remained here since then, Mr. Harrington continuing his work as a laboratory technician (R. 69-73). The Harringtons had five children (R. 71), the oldest being Arnold, Jr. who was eleven, and the youngest Kim, who was four (Ex. 3, Appl. No. 26-027-201).

At the time of Mr. Harrington's death, the family was purchasing a home at 617 Spruce Street, South San Francisco (R. 73). The insured's salary at St. Luke's Hospital, where he was employed, was about \$1200 per month (R. 74). Though the family had no pressing debts (R. 74), they also had no savings (R. 75). Mrs. Harrington testified that the insured had an ulcer which she said was in a controlled condition (R. 173-74); that he sometimes stuttered when excited (R. 80, 82-83); and that when angry with her, he would "calm himself" by going to the beach alone (R. 87).

The insured had a hobby of collecting guns. At the time of his death he was the owner of five rifles and a number of hand guns (R. 170, 205), including the German Mauser automatic pistol with which he killed himself.* Mr. Harrington could fairly be called an expert in the use of firearms. He was a hunter (R. 170); had been collecting guns for years (R. 170; Ex. 6, pp. 2-3); shot his guns once or twice a week at the firing range at Sharp's Park in the company of his

*The Mauser is in evidence as Exhibit 1 (R. 78).

son, Arnold, Jr. (R. 79, 171; Ex. 6, p. 4); was a member of the South San Francisco Rod and Gun Club and the National Rifle Association (R. 79; Ex. 6, p. 4); shot his guns in competition (Ex. 6, p. 4); and was a very good shot (R. 171; Ex. 6, p. 4). Though the insured had purchased the Mauser only a few weeks before his death (R. 78, 209), he was thoroughly familiar with it, as he was with all of his guns (R. 79, 171, 206, 210).

Mr. Harrington kept his hand guns in a box in the bedroom closet and the ammunition for them at another location (R. 171-72; Ex. 6, p. 3). No one but the insured ever handled the guns in the home (R. 172; Ex. 6, p. 5). With the possible exception of a French gun used for protective purposes (R. 177-78), none of the guns was ever kept in a loaded condition at the home, but all were invariably unloaded when Mr. Harrington and Arnold, Jr. returned home from the firing range (Ex. 6, p. 3). Nevertheless, at the time Mr. Harrington fired the fatal shot, the Mauser was loaded with ten rounds of ammunition (R. 138-39), and the trial court expressly found that Mr. Harrington knew it was loaded when he put it to his head (R. 19).

On the morning of February 5, 1960, the insured was suffering from a slight reaction to a flu shot and consequently stayed home from work (R. 83). During the middle of the morning he drove his wife and a lady friend to Chinatown (R. 83-84). Mrs. Harrington was to call her husband at 3:00 in the afternoon to make arrangements to return home, but she did not do so (R. 84). Instead she went to her friend's house, and there discussed with a theology student the "problem" of her marriage—the fact that though she was a Roman Catholic, she had not been married in her Church and was seeking such a marriage (R. 84). She finally called the insured at 6:00 in the evening, after he and the children

had already eaten (R. 85). When he picked her up Mr. Harrington was "considerably irritable" about her being late (R. 85), and continued to scold her after arriving at the home (R. 85-86). As a "defense" Mrs. Harrington ignored her husband and refused to speak to him (R. 85-86). The quarrel continued (R. 86). After a time the insured left the house, and apparently went alone to the beach as was his custom when angry with Mrs. Harrington (R. 87). Upon his return to the home, something less than an hour later, Mr. Harrington asked his wife "to make up" with him (R. 88), but she refused to do so, and instead continued to refuse to talk to him or even to look at him (R. 88, 176-77, 179). The insured then got up and went to the bedroom to get the Mauser (R. 177). Upon his return to the living room, appellee continued to refuse to speak to him or to look at him (R. 90). The insured then began to make clicking or snapping noises with the Mauser (R. 90) while seated to the left of appellee upon the living room couch (R. 89, 177).^{*} Mrs. Harrington identified these noises as similar to sounds produced at the trial by releasing the hammer of the gun with the safety mechanism set on safe (R. 90).

After a short time the insured got up, moved to a standing position directly in front of appellee and continued to make the snapping noises with the gun (R. 91). Mrs. Harrington looked up, saw the gun in the insured's right hand, and asked him not to make the noises because it made her "nervous" to hear them (R. 91). The insured continued to click the gun (R. 94), and appellee again admonished him (R. 95). Appellee was permitted to testify, over appropri-

^{*}Police diagrams and photographs of the living room and the objects in it were introduced in evidence as Exhibits A1-4 and B1-6 (R. 141, 147, 150). These diagrams and photographs are described and explained in the testimony of Police Officer James F. Swinfard (R. 140-150).

ate objection (R. 92, 95), that Mr. Harrington then said "Don't worry. The safety is on" and "I will prove it to you" (R. 95, 116).

The insured then placed the Mauser to his right temple and discharged it, firing the fatal shot (R. 95, 116). The bullet entered his head at the right temple and emerged slightly behind and above the left ear (R. 139). He fell to the floor, dropping the gun beside him (see Ex. A1), and died later the same evening at St. Luke's Hospital (R. 194). Over appropriate objection, Mrs. Harrington was permitted to testify that after the shot, Mr. Harrington looked at her with "great surprise upon his face, and he threw up his hands as he fell" (R. 118).*

Upon hearing the noise of the shot, the younger children, who had been in bed (R. 86) came into the living room, and Mrs. Harrington gathered them together and sent them all into the bedroom (R. 120-21). She then telephoned the South San Francisco police, who arrived upon the scene in "ten minutes or so" (R. 121). Over appropriate objection (R. 132, 134-37), Officer James F. Swinfard was permitted to testify that in response to his question as to what had happened (R. 131), Mrs. Harrington said "My husband just shot himself, but he didn't mean it" (R. 135).

*The only other witness to these events was Arnold Harrington, Jr., who was seated facing the living room approximately six to eight feet away from where Mr. Harrington stood (Ex. 6, pp. 9-11; Ex. 1 to the deposition of Mrs. Harrington; Ex. A1). It was stipulated by counsel that in order to avoid the necessity of calling Arnold as a witness at the trial, his deposition (Ex. 6) and his statement to the police (Ex. 4) might be admitted in evidence in lieu of testimony (R. 168-69). Arnold recalled that his parents had had a disagreement (Ex. 6, p. 9); that his father had been standing in front of the coffee table holding the Mauser in his hand (Ex. 6, pp. 11-12); that he did not remember what was said by his parents (Ex. 6, pp. 13-14); that he did not observe his father testing or pointing the gun (Ex. 6, p. 14); that he heard no clicking noises being made by the gun (Ex. 6, p. 14) and that he did not observe the firing of the fatal shot (Ex. 6, p. 14).

When found by the police, the Mauser was lying on the floor near the coffee table (R. 145; Ex. A-1; R. 149; Ex. B-1) and contained nine live rounds of ammunition (R. 151). The expended shell was found on one arm of the couch (R. 146; Ex. A-1). The hammer and safety of the gun were in the "back" position (R. 149; Ex. B-6), which was the full "fire" position of both hammer and safety (R. 235-36).

Three experts testified concerning the condition and manner of operation of the gun: Lester Moore for plaintiff and Robert Chow and Lowell W. Bradford for defendant.* All of the expert witnesses agreed that the gun was in normal operating condition and that it would not fire with the safety set on safe (R. 98, 110, 207, 227-28).

Plaintiff's theory of the case, as evidenced by questions directed to the expert witnesses, was that in manipulating the gun to produce the clicking or snapping sound which Mrs. Harrington heard, the insured inadvertently moved the safety from the safe to the fire position (R. 108-110, 218-19, 246-47) before putting the gun to his head and pulling the trigger (R. 246-47). The snapping sound, according to the evidence, could be produced by releasing the hammer of the gun in any one of three ways: by pulling the trigger with the safety set on safe (R. 101-02); by pushing the safety forward from the fire to the safe position (R. 103) and by "fanning" the hammer with the safety set on safe (R. 103). It was the testimony of the expert witnesses that it would be dangerous and imprudent for a man experienced with guns to tamper with a loaded Mauser in any one of these fashions and then to point the gun to his head. Mr. Chow characterized such conduct as "foolish" and "danger-

*Photographs made by Mr. Bradford of the Mauser in its three normal operating positions are in evidence as Exhibits C1-3, and are identified and explained at R. 230-31.

ous" (R. 222), and Mr. Bradford as "very dangerous and imprudent", whether or not one thought the safety to be on safe (R. 239). The District Court apparently was of the same opinion for it said that the insured's conduct might be characterized as "foolish or dangerous" (R. 20); "dangerous and unnecessary" (R. 28); "foolish, stupid, dangerous, perilous [and] unnecessary" (R. 30-31); and "dangerous, hazardous and negligent" (R. 257).

On February 5, 1960, the date of Mr. Harrington's death, there were in force two policies of insurance (Ex. 3) issued by New York Life to him as the insured. The total face amounts of the policies was \$15,000. They provided for the payment of double indemnity benefits under circumstances in which the death of the insured "resulted directly, and independently of all other causes, from accidental bodily injury * * *". The face amounts under both policies were paid without protest (R. 192), and the sole question for decision below was whether the death of the insured was accidental within the meaning of the double indemnity provisions.

After taking the case under submission, and on March 31, 1961, the District Court filed its Memorandum for Judgment to serve as its findings of fact and conclusions of law (R. 15-34).^{*} Judge Carter concluded that the insured's death resulted from accidental bodily injury (R. 31-32); denied defendant's motion to dismiss under Rule 41(b) (R. 33); overruled certain of defendant's objections to and motions to strike evidence upon which ruling had been reserved (R. 33); and awarded judgment to plaintiff (R. 34). The judgment, in the amount of \$15,000 with interest, was filed on April 20, 1961 and entered on April 21, 1961 (R. 38-39, 296). On April 28, 1961, appellant filed its notice of appeal (R. 40).

^{*}The court's memorandum is reported at 193 F. Supp. 675.

SPECIFICATION OF ERRORS

1. The District Court erred in admitting into evidence, over appropriate objection, the testimony of appellee that prior to his injury, Mr. Harrington told her not to worry because the safety of the gun was on safe and that he would “prove” it to her (R. 95, 115-116); and that he tried to show her that the safety was on safe (R. 94). Objection to this evidence was made upon the ground that it constituted inadmissible hearsay testimony (R. 92-93, 115-116). The court reserved its ruling upon this evidence, holding that this and all similar evidence would be received subject to an objection and motion to strike on the grounds stated (R. 92-93, 115-116). The objections were overruled and the motions to strike denied in the court’s memorandum (R. 33).

2. The District Court erred in admitting into evidence, over appropriate objection, the testimony of Mrs. Harrington that immediately after his injury, Mr. Harrington allegedly looked at her with “great surprise” upon his face, and threw up his hands as he fell (R. 118). Objection to this evidence was made upon the ground that it constituted hearsay testimony and a conclusion of the witness (R. 116-118). Both objections were overruled (R. 118).

3. The District Court erred in admitting into evidence, over appropriate objection, the testimony of Police Officer James F. Swinfard that some time subsequent to Mr. Harrington’s injury, and upon Mr. Swinfard’s arrival at the scene, appellee, in response to his question as to what had happened, replied that her husband had shot himself, but that he didn’t mean it (R. 131, 135). Objection was made to this evidence upon the ground that it constituted hearsay testimony (R. 132-135) and a motion to strike it was made upon the ground that it represented an opinion and conclu-

sion of the witness (R. 135-137). The court overruled the objection (R. 135-136) and apparently reserved its ruling upon the motion to strike (R. 136-137). The objection was again overruled and the motion to strike was denied by the court in its memorandum (R. 33).

4. The District Court erred in its findings that at the time of his injury the insured thought that the safety lever of the gun was in a safe position and that the gun would not fire in that condition (R. 19); that the fact that the safety lever of the gun was in the fire position at the time of firing was a condition unknown to and unexpected by the insured (R. 19); and that the insured had no intention to take his own life (R. 19). The District Court erred also in its finding and conclusion that the death of Mr. Harrington did not result from suicide (R. 19-20). These findings and this conclusion were based solely upon the foregoing inadmissible evidence and there is therefore no competent evidence in the record to sustain them.

5. The District Court erred in its finding that at the time of his injury, Arnold Harrington thought that the gun with which he fired the fatal shot could be safely pointed at his head (R. 19). There is no evidence whatever in the record, admissible or otherwise, to support this finding and it could only have resulted from pure speculation. Moreover the finding is clearly contrary to the evidence.

6. The District Court erred in its conclusion that the death of Arnold Harrington resulted directly from accidental bodily injury (R. 31-32), and in that connection, in its denial of defendant's motion to dismiss under Rule 41(b). The evidence demonstrates that the death of Arnold Harrington resulted from a needless and voluntary act so dangerous to human life that death followed as a foreseeable consequence. In these circumstances, death was not

accidental and appellant was entitled to judgment as a matter of law.

7. The District Court erred in applying the substantive law relating to the question of accidental death.

SUMMARY OF THE ARGUMENT

1. The findings, the conclusions and the judgment are based upon inadmissible evidence. Over appellant's earnest and repeated objections, the District Court permitted the following evidence to go into the record:

(i) The testimony of appellee that prior to firing the fatal shot, the insured told her not to worry because the safety of the Mauser was set on safe, and that he would "prove" it to her (R. 95, 115-16); and that he tried to show her that the safety was on safe (R. 94);

(ii) The testimony of appellee that immediately after his injury, the insured looked at her with "great surprise" upon his face, and threw up his hands as he fell (R. 118); and

(iii) The testimony of Police Officer James F. Swinfard that more than ten minutes after the shooting, and upon his arrival at the scene, appellee told him that her husband had shot himself, but that he didn't mean it. (R. 131, 135).

All of this evidence was plainly hearsay, and much of it consisted solely of the opinions and conclusions of appellee. Since the District Court relied upon the evidence in deciding the case, its admission was reversible error. Moreover, since without this inadmissible evidence, the inference of suicide would have been inescapable, appellant is entitled to judgment.

2. On the basis of the undisputed evidence, appellant is entitled to judgment as a matter of law. The rule of law established by the cases, including decisions of the Supreme Court of California which are directly controlling, is that when a man voluntarily and needlessly performs an act so dangerous to human life that death follows as a foreseeable consequence, death, when it occurs, is not accidental. The evidence is undisputed that on the evening of February 5, 1960, Arnold Harrington loaded a Mauser automatic pistol with ten rounds of ammunition, and, knowing it to be loaded, placed it to his head and pulled the trigger. In these circumstances, death was not accidental as a matter of law, and appellant was and is entitled to judgment.

3. The District Court erred in applying the substantive law relating to the question of accidental death. In reaching its decision, the District Court failed to follow controlling decisions of the Supreme Court of California relating to the question of accidental death. In addition, the District Court erroneously determined that the hazardousness of the conduct of the insured was to be judged, not by the objective standard of foreseeability, as is the rule of the cases, but by the subjective standard of the state of mind of the insured. Since the District Court applied an erroneous standard of law in reaching its decision, the judgment must be reversed. Moreover, since under either the proper rule of law or the erroneous rule of law applied by the court, the death of the insured could not have been accidental, appellant is entitled to judgment.

ARGUMENT

1. The Findings, the Conclusions and the Judgment Are Based Upon Inadmissible Evidence.

First: It was error to admit into evidence the alleged statement of the insured prior to his injury.

Over appropriate objection by appellant (R. 92-93, 115-16) Mrs. Harrington was permitted to testify that, prior to firing the fatal shot, the insured told her not to worry because the safety of the gun was on safe and that he would "prove" it to her (R. 95, 115-116); and that he tried to show her that the safety was on safe (R. 94). The testimony of appellee concerning the alleged statements of the insured was, of course, plainly hearsay. Since it was necessarily based upon these alleged statements, appellee's testimony that her husband tried to show her that the safety was on safe was also hearsay.

The court's opinion does not disclose the ground upon which this hearsay evidence was admitted (R. 33), but the ground which was urged at the trial was that the evidence was relevant to show the state of mind of the insured and was, therefore, admissible under the state-of-mind exception to the hearsay rule (R. 58-59). It is, of course, true that oral evidence of a state of mind, where relevant, may properly be admitted in some circumstances. Such evidence is admissible however, *only* where there is evidence that the statements made are probably trustworthy and credible and where they were made at a time when there was no motive to deceive. See *People v. Hamilton*, 55 A.C. 887, 900-01, 362 P.2d 473, 481 (1961):

"From these discussions several general principles have developed. One is that, while declarations directly asserting the existence of a mental condition on the part of the decedent-declarant, and not including a description of the past conduct of a third person that may have caused that mental condition, are and should be admissible, they should be admitted only where there is at least circumstantial evidence that they are probably trustworthy and credible. As was said by this court in *People v. Brust*, 47 Cal. 2d 776, 785, [306 P.2d

480], in quoting from *People v. Weatherford*, 27 Cal. 2d 401, 421 [164 P.2d 753], such declarations are 'admissible only if there appears to be a necessity for that type of evidence and a circumstantial probability of its trustworthiness (V Wigmore, p. 202, § 1420) . . . The death of the declarant creates the necessity for resort to hearsay and the declarations, being those of a present existing state of mind, made in a natural manner and not under circumstances of suspicion, carry the probability of trustworthiness. (VI Wigmore, § 1725, p. 80)' (See also McCormick, *Evidence* (1954), § 268, p. 568). Wigmore also has stated that such declarations are admissible only when they are 'made at a time when there was no motive to deceive.' (6 Wigmore, *Evidence*, (3d ed. 1940), § 1730, p. 94)."

See also *Milton v. Hudson Sales Corp.*, 152 C.A. 2d 418, 439, 313 P.2d 936, 949 (1957):

"While declarations of design, intention or purpose, are sometimes admissible as an exception to the hearsay rule, such exception exists only where such declarations possess a high degree of trustworthiness on the issue involved."

These criteria plainly are not satisfied by the alleged statements of the insured. Mr. Harrington was considerably upset at appellee for being late (R. 85-86); his anger had been enhanced by her continued refusal to "make up" with him, or even to speak to or look at him (R. 86, 88, 176-77, 179); and the conclusion is inescapable that at some time during the evening he had loaded the Mauser automatic with ten rounds of ammunition (see *supra* p. 4). There is therefore substantial evidence that the insured was at least contemplating suicide as a relief from his frustrations. Why else would he have loaded the gun? Yet he knew that if it were established that he had taken his own life, no pay-

ment could be made under the double indemnity provisions of his insurance policies. The policies so provide. He also knew that a finding of suicide would be acutely distressing to his wife and children. If suicide was indeed his purpose, the insured had every reason to conceal it and to create an appearance of death by accident. How then can it be said that plaintiff has established that Mr. Harrington's alleged statements were "probably trustworthy and credible" or that they were "made at a time when there was no motive to deceive?"

This evidence was unreliable and its admission was error.

Second: It was error to admit the testimony of appellee concerning the alleged manifestations of the insured after his injury.

Mrs. Harrington was permitted to testify that, immediately after his injury, the insured allegedly looked at her with "great surprise" upon his face and threw up his hands as he fell (R. 118). The difficulty with this evidence is that it was opinion evidence of the purest sort, designed to buttress appellee's testimony concerning insured's alleged statements concerning the condition of the gun. It is settled that opinion evidence is admissible only when the witness has no other way to describe what took place, and when there is some basis in the experience of the witness for arriving at the opinion or conclusion stated. See 32 C.J.S., Evidence, § 444, pp. 72-73; § 455, p. 94. The trial court, aware of this rule, cautioned appellee to describe insured's facial expression rather than to state her conclusion as to his frame of mind (R. 117). But the testimony, as given and received over objection, was not so limited (R. 117-118). It must be clear beyond question that Mrs. Harrington could not possibly have had any basis in experience for characterizing insured's expression as one of surprise. Mr. Har-

rington was in a state of extreme shock. A bullet had just passed through his brain. It was obviously impossible for appellee, as it would have been for any witness, to take into account the shock of the injury and to conclude nevertheless that insured's expression was one of surprise.

Third: It was error for the District Court to admit into evidence the testimony of officer Swinfard concerning the statement made to him by appellee.

Officer Swinfard was permitted to testify that some time subsequent to insured's injury, and upon his arrival at the scene, Mrs. Harrington, in response to a question as to what had happened, replied that her husband had shot himself, but that he didn't mean it (R. 131-135). This evidence was admitted over strenuous objection that it was hearsay testimony (R. 132-135) and that it constituted an opinion and conclusion of the witness (R. 135-37).

The court ruled that the evidence was admissible within the *res gestae* exception to the hearsay rule (R. 132, 135). This ruling was error. The basis for the *res gestae*, or spontaneous declaration, exception to the hearsay rule is the circumstantial guarantee of trustworthiness existing when the declarations are made under the immediate influence of the occurrence to which they relate and before the reflective capacities of the witness have returned. For this reason "the utterance must have been made before there has been time to contrive and misrepresent, i.e., while the nervous excitement may be supposed still to dominate and the reflective powers to be yet in abeyance * * *." *Showalter v. Western Pacific R. R. Co.*, 16 C.2d 460, 468, 106 P.2d 895, 900 (1940). Where there has been sufficient elapsed time to allow the witness to think over the events, and particularly where the declarations made are self-serving, they are not admissible. *People v. Perkins*, 8 C.2d 502, 66 P.2d 631

(1937). The fact that the declarant has in the meantime given attention to other matters, see 32 C.J.S. Evidence, § 419, p. 52, or that the declaration was elicited by a question from another, see *United States v. One 1949 Pontiac Sedan*, 194 F.2d 756 (C.A. 7 1952), *cert. denied*, 343 U.S. 966 (1952), tends to destroy the spontaneous character of the declaration.

Appellee testified that after Mr. Harrington's injury she first gathered the children together, and sent them into the bedroom (R. 120-21), an act which may have required some time and which quite apparently required an exercise of her reflective capacities. She then telephoned the police (R. 120). Mrs. Harrington thought that the police arrived "in ten minutes or so" after her call (R. 121). During this period she obviously had ample time to consider what might be said to the police upon their arrival. Her statement to Officer Swinfard was made in response to his question as to what had happened (R. 131, 135). There is no evidence that appellee was in a state of shock when she made the statement. It was to her interest both as a wife and mother and as a beneficiary under the policies of insurance to avoid an appearance of suicide. In these circumstances, it seems clear, appellee's declaration was not admissible as a part of the *res gestae*.

Moreover, it seems inescapable that the declaration constituted an inadmissible conclusion and opinion of the witness. For what appellee said was this: "My husband just shot himself, but he didn't mean it" (R. 135). This was not a summary statement of fact, based upon Mrs. Harrington's experience, but a speculation by her as to the ultimate issue in this case. Had she attempted to express such an opinion at the trial, the court should have excluded it as a matter of course. The opinion was obviously not rendered

admissible by the fact that it was made by Mrs. Harrington outside of court and while not under oath.

There can be no doubt that the District Court relied heavily upon the foregoing inadmissible evidence in reaching its decision. Thus for example, the alleged statements of Mr. Harrington are directly referred to in the court's memorandum (R. 18, 31) and the objections to them were expressly overruled in that memorandum (R. 33). Moreover, the court's findings can be supported, if at all, only upon the basis of this evidence. The court found:

"(2) That deceased knew the gun was loaded, but he thought the safety lever was in a safe position and that the gun would not fire in that condition, and, further, that the gun could be pointed at his head safely in that condition;

"(3) That at the time of the firing the safety lever of the gun was in the fire position, but that this condition was unknown to and unexpected by deceased; and

"(4) That the deceased had no intention to take his own life" (R. 19).

Other than the foregoing inadmissible testimony, there is no evidence whatever in the record to support any of these findings.

This means that the judgment must be reversed in any event. It also means that this Court should enter judgment for appellant, for without this inadmissible evidence it is clear that plaintiff could not have prevailed. Plaintiff had the burden of proving accidental death, and, in that connection, of proving that death was not the result of suicide. *Zuckerman v. Underwriters at Lloyd's*, 42 C.2d 460, 267 P.2d 777 (1954). The undisputed facts, the inadmissible evidence aside, are these: that the insured placed a loaded gun, which he knew to be loaded, to his head and pulled the trigger, firing the fatal shot. In these circumstances, the

inference of suicide is inescapable and appellant is therefore entitled to judgment. See *Trivette v. New York Life Insurance Company*, 283 F.2d 441 (C.A. 6, 1960).

2. On the Basis of the Undisputed Evidence Appellant Is Entitled to Judgment as a Matter of Law.

The applicable rule of law is this: when a man voluntarily and needlessly performs an act so dangerous to human life that death follows as a foreseeable consequence, death, when it occurs, is not accidental. These facts are undisputed: on the evening of February 5, 1960, the insured loaded the Mauser automatic with ten rounds of ammunition (see *supra*, p. 4) and, knowing it to be loaded (R. 19), placed it to his temple and discharged the fatal shot (R. 95, 116). In these circumstances, death was not accidental as a matter of law.

It is admitted and beyond dispute that insured voluntarily and intentionally pointed the gun, knowing it was loaded, at his temple and voluntarily and intentionally pulled the trigger. Appellee's position is that in doing this insured mistakenly relied on the safety mechanism to protect him and that somehow he inadvertently moved the safety lever from the safe position to the fire position (R. 108-110, 218-19, 246-47) before putting the gun to his head and pulling the trigger (R. 246-47). Under the rule of the cases the mistaken assumption that the safety would protect him (even if it be assumed from his hearsay statement that insured held such an assumption) could not establish this as accidental bodily injury. On the contrary, to place a loaded gun to one's head and pull the trigger while relying on the safety for protection is hazardous in the extreme; to do so after tampering with the safety is tantamount to suicide. Mr. Harrington's conduct was in no sense accidental and the fatal consequence was not an accident.

The leading California decision is *Postler v. Travelers Ins. Co.*, 173 Cal. 1, 158 Pac. 1022 (1916), *overruled on other grounds in Zuckerman v. Underwriters at Lloyd's*, 42 C.2d 460, 474, 267 P.2d 777, 785 (1954). Postler, the insured, had lost money in a gambling club. He purchased a revolver and returned to the club for the purpose of getting back the money he had lost. He was killed in an exchange of shots after recovering the money by use of the gun. The Supreme Court of California reversed judgment upon a jury verdict for the plaintiff, holding:

“ . . . In order to recover the plaintiff was bound to allege and prove an injury of a kind covered by the contract, i.e., one effected through external, violent, and accidental means. [Citations] The appellant contends, and we think upon good ground, that under any reasonable view of the evidence, the injuries suffered by Postler were not produced by accidental means, but were the natural and probable consequence of his own voluntary acts. In *Western Commercial Travelers' Assn. v. Smith* (85 Fed. 401, 405 [40 L.R.A. 653, 29 C.C.A. 223]), the court said that ‘an effect which is the natural and probable consequence of an act or course of action is not an accident, nor is it produced by accidental means. It is either the result of actual design, or it falls under the maxim that every man must be held to intend the natural and probable consequence of the means which produced it. . . .’ ” (173 Cal. at 4, 158 Pac. at 1023-24).

Other California decisions to the same effect are *Price v. Occidental Life Ins. Co.*, 169 Cal. 800, 147 Pac. 1175 (1915) and *Eraldi v. North American Accident Ins. Co.*, 20 F. Supp. 735 (N.D. Cal. 1937). Although these cases involved a different type of risk than that assumed by Mr. Harrington—the risk of death by the hand of another, rather than

by the hand of the insured—they are indistinguishable in principle. In each of them the insured faced a grave risk of death; in each of them he undoubtedly hoped—even expected—to survive; and in each of them, death, when it occurred, was unexpected.

Cases in other jurisdictions directly support the rule of *Postler and Price*. In *Allred v. Prudential Ins. Co. of America*, 100 S.E. 2d 226 (N.C. 1957), the insured, a boy of 14, was returning to the country with friends after an evening in town. In order to show the other boys “how brave” he was, Allred lay down in the middle of the highway with his head on the center line. When warned by his friends of an approaching car, Allred did not answer but remained upon the road. The car ran over his body, killing him instantly. The court, in affirming a judgment of involuntary non-suit, held:

“Applying these principles [the decisions in the *Thompson* and *Baker* cases discussed below] to case in hand, this Court is constrained to hold that the facts and circumstances shown by the undisputed evidence disclose that the death of the insured was ‘the natural and probable consequence of an ordinary act in which he voluntarily engaged.’” (100 S.E. 2d at 231)

In *Kinavey v. Prudential Ins. Co. of America*, 27 A.2d 286 (Pa. super. 1942) the insured, in a visibly intoxicated condition, was in the company of friends near a bridge spanning a river. Eluding his friends, he climbed over the rail of the bridge and, standing upon a narrow ledge outside the rail, commenced doing various acrobatic stunts. Just before his friends could reach him, Kinavey lost his balance, fell backward into the river and drowned. The court said, in affirming an involuntary non-suit at the close of plaintiff’s case:

“The inference is reasonable that, with the dulling of his normal inhibitions, he, though he realized

the risk and was warned of it by his friends, voluntarily placed himself in a position of great danger and by his conduct was guilty of such recklessness that falling from the bridge was not only foreseeable by him, but was almost inevitable. We are in agreement with the lower court that death, therefore, did not result from accidental means and that there can be no recovery." (27 A.2d at 287).

In *Ford v. Standard Life Ins. Co.*, 12 CCH Life, Health and Accident Cases 789 (Tenn. App. 1947), the insured was a member of a church which taught that its anointed members could handle poisonous serpents without suffering harm. Believing in the teachings of the church, Ford voluntarily took a rattlesnake into his hands, was bitten, and died within an hour. The court affirmed a directed verdict for the defendant in these words:

"Was the death of the insured under the facts heretofore shown due to accident?

"We do not have a state of facts where one is bitten by a poisonous snake while walking through the woods or fields. The snake does not suddenly and without warning come on the insured and bite him. The insured of his own free will voluntarily handles the snake without any attempt to protect himself. Certainly this voluntary assumption of this risk is not accidental. It was of his own design. The misconception of the biblical command or language of the Bible will not excuse a person and allow him to profit thereby." (p. 791).

Two cases arose on facts closely comparable to those presented here: *Baker v. National Life & Accident Ins. Co.*, 298 S.W. 2d 715 (Tenn. 1956), and *Thompson v. Prudential Ins. Co. of America*, 66 S.E. 2d 119 (Ga. App. 1951). In *Baker*, the insured had placed a 2" x 5" pepper can upon his head and invited a friend to shoot at it. Just as the

friend was squeezing the trigger of the gun, the can started to fall and the insured jerked his head up into the path of the bullet. The court, in affirming an involuntary dismissal of the action, held:

"From the above stipulation of facts we are of the opinion that the insured should have reasonably foreseen that death, or injury, might result from his own voluntary act.

..* * *

"Death is not caused by accidental means, if it is a natural and foreseeable result of a voluntary, though unusual and unnecessary act or course of conduct of the insured. Target practice with a pistol and with a pepper-can sitting on the head of a human being as the target is neither a usual nor necessary avocation. One who volunteers his head for such an experience must anticipate injury, if he is a normal person." (298 S.W. 2d at 716, 717)

In *Thompson*, the insured had determined by experiment that if one cartridge were placed in a revolver and the cylinder spun, the loaded chamber would "always" come to rest at the bottom and the gun therefore would not fire. Apparently relying upon this mechanical circumstance and assuming that as usual the gun would not fire, Thompson placed a cartridge in one chamber, spun the cylinder, and subsequently placed the gun to his head and pulled the trigger. The gun discharged, killing him. The court affirmed a directed verdict for the defendant, holding:

"Where one places a loaded pistol to his head and voluntarily pulls the trigger, knowing the gun to be loaded and lethal, nothing more appearing, it is unquestionably no accident that his action results in his injury or death, nor can his death or injury be said to have been effected by accidental means. So too, where one engages in a game of Russian Roulette in

which all but one of the cartridges are removed from the cylinder of a revolver, the cylinder is spun, the revolver is placed by the participant to his head, and the trigger is voluntarily pulled without ascertaining the position of the cartridge in the chamber in its relation to the firing mechanism, and it occurs that when the trigger is pulled the gun fires and kills or injures the participant, his death or injury is no less intentional than had the gun been fully loaded and his death or injury cannot be said to have been the result of accident or effected by accidental means. In such a case, it will be presumed that the participant intended that he should be killed or injured should fate stop the cartridge in the spinning cylinder in firing position. One engaging in such a bizarre pass-time with a lethal weapon, if he be compos mentis, knows that he is courting death or severe injury, and will be held to have intended such obvious, and well known results if he is killed or injured." (66 S.E. 2d at 123)

These decisions are directly in point. In both of them, and as is contended by appellee here, death was caused by a mistake. Just as Mr. Harrington relied upon the safety of the Mauser, Baker relied upon the marksmanship of his friend and Thompson relied upon the mechanical circumstance of the loaded chamber "always" coming to rest at the bottom of the cylinder. In both of these cases, and because of a circumstance which was actually unexpected, reliance was misplaced. In *Baker* the can unexpectedly fell, and the insured therefore jerked his head into the path of the bullet. In *Thompson* the loaded chamber, for the first time, failed to come to rest at the bottom of the cylinder and the gun unexpectedly discharged. In both *Thompson* and *Baker* death was held not accidental as a matter of law.

The rule of law established by the cases is this—that when a man needlessly and voluntarily performs an act so

dangerous that death follows as a foreseeable consequence, death, when it occurs, is not accidental. Can there be any question that that rule applies here? There is no doubt that Mr. Harrington's conduct was needless. In the words of the District Court, it could be characterized as "foolish" (R. 20) and "unnecessary" (R. 28, 31). Nor is there any question that what he did was voluntary. The District Court found that death was "caused by the voluntary act of the deceased" (R. 19). The extreme danger of Mr. Harrington's conduct would be apparent to anyone. It was apparent to the expert witnesses who termed it "foolish" and "dangerous" (R. 222) and "very dangerous and imprudent" (R. 239) and it was apparent to the District Court which said it might be characterized as "foolish or dangerous" (R. 20) "dangerous and unnecessary" (R. 28) and "foolish, stupid, dangerous, perilous [and] unnecessary * * *" (R. 30-31).*

Did death follow as a foreseeable consequence of the act? Obviously, it did. In the words of the District Court "he [Mr. Harrington] either knew or should have known that he was doing a dangerous thing". (R. 281) The law is clear. Under the rule of the cases, death was not accidental and appellant was and is entitled to judgment.

*See also the statements made by the District Court during argument: "Now, I would go further. That it was caused by a dangerous, hazardous, negligent act on the part of the deceased by pointing the gun at his head when it was loaded and he knew it was loaded * * *"

"* * *"

"So, you come to the question: is the performance of a dangerous, hazardous, negligent act which does produce death one that would either make it accidental or non-accidental". (R. 256-57)

3. The District Court Erred in Applying the Substantive Law Relating to the Question of Accidental Death.

The District Court correctly held that since California law governs this action, it was the duty of the court to apply that law as expounded by the Supreme Court of this State (R. 21). The court apparently concluded, however, that no decisions of the California Supreme Court were controlling (R. 22).^{*} This was error, for the decisions of the Supreme Court of California in the *Postler* and *Price* cases clearly established the rule of law which must govern here. It is true that the facts in *Postler* and *Price* were not identical to the facts of the present case, but the legal principles involved were identical, and the rule of law established by those cases cannot be ignored. See *United States Fidelity & Guaranty Co. v. Anderson Const. Co.*, 260 F.2d 172 (C.A. 9 1958); *Benz v. Compania Naviera Hidalgo, S.A.*, 233 F.2d 62 (C.A. 9 1956), *aff'd*, 353 U.S. 138 (1957). In the *Baker* and *Thompson* cases that same rule was applied to factual situations comparable to those presented here, and resulted in judgments for the defendants as a matter of law. If the same facts were presented to the California courts, there is no reason whatever to suppose that they would not follow those decisions.

The District Court apparently concluded that the authority of *Postler* and *Price* had been weakened by more recent decisions of the California District Courts of Appeal in *Losleben v. California State Life Ins. Co.*, 133 Cal. App. 550, 24 P.2d 825 (1933), *Rooney v. Mutual Benefit Health and Accident Ass'n*, 74 C.A. 2d 885, 170 P.2d 72 (1946)

^{*}The court said in its memorandum: "Careful research by counsel and by the Court fails to disclose any California case which closely resembles this case on its facts and it would be difficult to say with certainty what the California courts would hold under these circumstances." (R. 22)

and *Cox v. Prudential Ins. Co.*, 172 C.A. 2d 629, 343 P.2d 99 (1959). (R. 28-30). We find nothing in those cases which questions or criticizes the rule of law established in *Postler and Price*. On the contrary, those decisions are either clearly distinguishable or, to the extent that they are relevant at all, they endorse the rule of *Postler and Price*. We discuss and distinguish them herewith.

Losleben v. California State Life Ins. Co., 133 Cal. App. 550, 24 P.2d 825 (1933) held that injuries received by a workman who jumped down from a three foot bench in the course of his duties were caused by accidental means. There was no voluntary exposure to extreme danger as in *Postler and Price*, and there was therefore no need even to consider the effect of those decisions, much less to question their authority.

Rooney v. Mutual Benefit Health and Accident Ass'n., 74 C.A. 2d 885, 170 P.2d 72 (1946) holds only that injuries sustained by the insured upon being knocked to the street in a fist fight resulted through accidental means. The basis for the decision in *Rooney* was that it could not be said as a matter of law that the insured should have foreseen that by entering into the fight he might bring about his death. The principle of law applied was therefore the same as that announced in *Postler and Price*. The distinction between the slight risk involved in engaging in a fist fight as in *Rooney* and the mortal hazard involved in entering into a gun fight as in *Postler and Price*, or in pointing a loaded gun at one's head as in the present case, needs no elaboration.

In *Cox v. Prudential Ins. Co.*, 172 C.A. 2d 629, 636, 343 P.2d 99, 103 (1959), the insured had jumped out of a moving vehicle, but had fallen to the road uninjured. In an effort to escape from the peril of oncoming traffic, Cox rolled to

the right, and was run over by a truck. The court held that death resulted through accidental means since "it cannot be said as a matter of law that Cox knew or reasonably could have anticipated that in going to his right he would be run over by the truck." Again the rule of law applied was the same as that in *Postler* and *Price*, the difference being that Cox, in attempting to escape from a position of peril, might not reasonably have foreseen the increased danger he was creating, while in *Postler* and *Price*, as in the present case, the danger was obvious. None of these cases, either expressly or by indirection, questions the rule of *Postler* and *Price*.

The memorandum of the District Court strongly suggests that in determining the question of the hazardousness of Mr. Harrington's conduct, the court applied not the objective standard of foreseeability to the reasonable man, as is established by the cases, but the subjective standard of the state of mind of the insured. This conclusion follows from the court's definition of an accident for the purposes of this case, as "a casualty—something out of the usual course of events, and which happens suddenly and unexpectedly, and without any design on the part of the person insured * * *" (R. 24-25). It follows also from the fact that the court found it necessary to find that the insured thought that the loaded gun could be pointed safely at his head (R. 19), a finding which would have been immaterial if an objective standard had been applied.

The rule of law applied by the District Court was erroneous, for it is settled that where, as here, the insured voluntarily and needlessly places himself in extreme danger, the apprehension of that danger is to be determined by the objective standard of reasonable foreseeability. See the following California decisions where that rule was stated and applied:

Postler v. Travelers Ins. Co., 173 Cal. 1, 5, 158 Pac. 1022, 1024 (1916), *overruled on other grounds in Zuckerman v. Underwriters at Lloyd's*, 42 Cal.2d 460, 474, 267 P.2d 777, 785 (1954),

(whether the death of the insured "was the natural and probable consequence of his own voluntary acts");

Eraldi v. North American Accident Ins. Co. 20 F. Supp. 735, 738 (N.D. Cal. 1937),

(whether the insured "either foresaw or should have foreseen that death or injury might result");

Rooney v. Mutual Benefit Health and Accident Ass'n., 74 Cal. 2d 885, 890, 170 P.2d 72, 75 (1946),

(whether "in utilizing the means to which he resorted the insured knew or should have known that he would probably sustain the injury which resulted as a consequence thereof");

Cox v. Prudential Ins. Co., 172 Cal. 2d 629, 636, 343 P.2d 99, 103 (1959),

(whether the insured "knew or reasonably could have anticipated" the injury which resulted).

Since it appears that the District Court failed to apply the proper rule of law, the judgment must be reversed. See *Lindbar, Inc. v. St. Louis Fuel & Supply Co.*, 276 F.2d 882 (C.A. 6 1960); *Bogue Electric Mfg. Co. v. Coconut Grove Bank*, 269 F.2d 1 (C.A. 5 1959). Since the death of the insured was clearly foreseeable, judgment should also be entered for appellant under the rule of law established by the cases.

Moreover, even under the subjective test erroneously applied by the court, it seems plain that death was not acci-

dental. The finding of the court that the insured thought that the loaded gun could be safely pointed at his head cannot be sustained, for there is no basis whatever for it in the evidence. On Mrs. Harrington's own testimony (R. 95, 116) the insured wanted to "prove" to her that the safety was on safe and so (notwithstanding her expressed apprehension about his "snapping" the gun mechanism), he intentionally pointed the gun at his head and pulled the trigger. Under these circumstances he wilfully, needlessly and recklessly took the risk that the safety would not work or had become dislodged. He took this chance and lost. To conclude as the District Court did that the insured anticipated no danger was speculation of the purest sort and, as such, was error. See *In re Leichter*, 197 F.2d 955 (C.A. 3 1952). It is clear beyond question that Mr. Harrington was aware of the hazard involved in his conduct. He was an expert in the use of firearms and knew full well that if the safety of the gun were not in place or did not function, he would be killed. Unless he had that risk in mind, there would be no purpose in doing what he did—no point in "proving" so dramatically that the safety would work. Equally convincing, and much more prudent, "proof" of the effectiveness of the safety device could have been demonstrated by pointing the gun at the floor or the ceiling and pulling the trigger. But the insured sought to dramatize the proof by voluntarily embracing the calculated danger of death. In pointing the gun at his head, he either intended to kill himself or was recklessly and needlessly demonstrating his willingness to accept a mortal risk.

As a matter of law, it makes little difference whether Arnold Harrington intended to kill himself or thought that the safety would protect him. In the one case his act was suicidal. In the other it was so inherently and obviously

dangerous as to involve a grave risk of mortal injury, which occurring, was not accidental. In either case, appellant is entitled to judgment.

CONCLUSION

For the foregoing reasons, the judgment should be reversed and the case remanded with directions that judgment be entered for appellant.

Dated : September 27, 1961.

Respectfully submitted,

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Attorneys for Appellant

(Appendix Follows)

Appendix

Pursuant to subdivision 2(f) of Rule 18 of the Rules of this Court the following reference is made to exhibits a part of this record:

Exhibits	Identified	Offered	Received
Plaintiff's Ex. 1, Mauser automatic pistol and holster.....	R. 78	R. 78	R. 78
Plaintiff's Ex. 2, Proofs of Death, Claimant's Statement	R. 122-23	R. 123	R. 124
Plaintiff's Ex. 3, policies of insurance	R. 125	R. 125	R. 125-26
Plaintiff's Ex. 4, statement of Arnold Harrington, Jr.....	R. 161	R. 168-69	R. 168-69
Plaintiff's Ex. 5, statement of Joyce A. Harrington.....	R. 161		
Plaintiff's Ex. 6, Deposition of Arnold Harrington, Jr.	R. 169	R. 169	R. 169
Plaintiff's Ex. 7, May 3, 1960 letter from defendant to plaintiff	R. 255	R. 255	R. 255
Defendant's Ex. A1-4, police diagrams of living room.....	R. 140-41	R. 142	R. 142-43
Defendant's Ex. B1-5, police photographs of living room.....	R. 147	R. 147	R. 147
Defendant's Ex. B6, police enlargement of Ex. B1.....	R. 150	R. 150	R. 150
Defendant's Ex. C1-3, photographs of Ex. 1.....	R. 230	R. 230	R. 230

No. 17398

In the
United States Court of Appeals
For the Ninth Circuit

NEW YORK LIFE INSURANCE COMPANY,
a corporation,

Appellant,

vs.

JOYCE A. HARRINGTON,

Appellee.

BRIEF FOR APPELLEE

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TABLE OF AUTHORITIES CITED

Cases

- Allred v. Prudential Ins. Co., 242 N. C. 105, 100 S. E. 2d 226
- Baker v. National Life & Acc. Ins. Co., 201 Tenn. 247,
298 S. W. 2d 715
- Cox v. Prudential Ins. Co., 172 C. A. 2d 629, 343 P. 2d 99
- Dark v. Prudential Ins. Co., 4 C. A. 2d 338, 40 P. 2d 906
- Davilla v. Liberty Life Ins. Co., 114 C. A. 308, 299 P. 831
- Dolberg v. Pacific Elec. R. Co, 126 C. A. 2d 487, 272 P. 2d 527
- Eckis v. Graves Tank and Manufacturing Co., 289 F. 2d 335 (CCA 9)
- Eraldi v. North American Acc. Ins. Co., 20 F. Supp. 735 (ND Cal.)
- Ford v. Standard Life Ins. Co., 12 CCH Life, Health and Accident
Cases 789 (Tenn. App.)
- Healey v. Visalia & T. R. Co., 101 C. 585, 36 P. 125
- Kinavey v. Prudential Ins. Co., 149 Pa. Super. 568, 27 A. 2d 286
- Landress v. Phoenix Mut. L. Ins. Co., 291 U. S. 491, 54 S. Ct. 461
- Losleben v. California State Life Ins. Co., 133 C. A. 550, 24
P. 2d 825
- Manney v. Housing Authority, 79 C. A. 2d 454, 180 P. 2d 69
- Monarch Ins. Co. of Ohio v. Spach, 281 F. 2d 401 (CCA 5)
- New York Life Ins. Co. v. Dick, 359 U. S. 437, 79 S. Ct. 921
- New York Life Ins. Co. v. Schlatter, 203 F. 2d 184 (CCA 5)
- Olinsky v. Railway Mail Ass'n, 182 C. 669, 189 P. 835
- People v. Beacon, 117 C. A. 2d 206, 255 P. 2d 98
- Postler v. Travelers Ins. Co., 173 C. 1, 158 P. 1022

Price v. Occidental Life Ins. Co. , 169 C. 800, 147 P. 1175

Richards v. Travelers Ins. Co. , 89 C. 170, 26 P. 762

Rock v. Travelers Ins. Co. , 172 C. 462, 156 P. 1029

Rooney v. Mutual Benefit Health and Accident Ass'n. , 74
C.A. 2d 885, 170 P. 2d 72

Stokes v. Police and Firemens Ins. Ass'n. , 109 C.A. 2d
928, 243 P. 2d 144

Thompson v. Prudential Ins. Co. , 84 Ga. App. 214, 66 S. E.
2d 119

Whitlow v. Durst, 20 C. 2d 523, 127 P. 2d 530

Zuckerman v. Underwriters at Lloyds, 42 C. 2d 460, 267
P. 2d 777

Statutes

Fed. Rules Civ. Proc. rule 43 (a), 28 U.S.C.A.

Fed. Rules Civ. Proc. rule 61, 28 U.S.C.A.

Treatises

American Law Reports, Annotated, Vol. 163, p. 186

American Law Reports, Annotated, Vol. 166, p. 477

American Law Reports, Annotated, Second Series,
Vol. 53, p. 1287

Annual Survey of American Law, 1955, p. 629

Annual Survey of American Law, 1957, p. 548

McCormick, Evidence, p. 583

Webster's International Dictionary, Second Revised Edition

Witkin, California Evidence, pp. 243, 297-298

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NEW YORK LIFE INSURANCE COMPANY,)
a corporation,)

Appellant,)

vs.)

No. 17398

JOYCE A. HARRINGTON,)

Appellee.)

BRIEF FOR APPELLEE

This is an appeal from a judgment based upon Findings of Fact and Conclusions of Law made by the trial judge who heard the case without a jury. The Findings are amply supported by legally acceptable evidence and the judgment should be sustained.

It is Appellant's main contention that it was entitled to judgment as a matter of law because "Mr. Harrington voluntarily and needlessly performed an act so dangerous to human life that death followed as a foreseeable consequence." (Appellant's Brief, pp. 2, 19) This argument was made to the trial court and is answered by the trial judge in his memorandum opinion. We have

therefore included the opinion as Appendix A to this brief. In further answer, we have commented briefly on this subject in the argument section of this brief.

Appellant's other contention - that the judgment of the trial court is infirm because predicated, in part, upon inadmissible or nonexistent evidence, will be answered in the argument to follow.

JURISDICTION

Appellee adopts the statement of jurisdiction made by Appellant at page 2 of its brief.

STATEMENT OF THE CASE

The evidence was without substantial conflict. However, in their statement of the case counsel for Appellant omit certain evidence which, undoubtedly, played an important role in connection with the trial court's finding that Arnold Harrington's death "was not the result of suicide," (R. 20)* and that his death "resulted directly from accidental bodily injury." (R. 31-32) We therefore supplement Appellant's statement of the case with the following material.

Plaintiff was born in China and completed three years of

*We have adopted Appellant's mode of reference to the printed record and exhibits. (See Appellee's Brief, footnote, p. 2)

college there. (R. 68) Arnold Harrington attended junior college in Iowa and continued his study of bacteriology and hematology during his service as a pharmacist mate in the United States Navy. (R. 69, 75-76)

Mr. and Mrs. Harrington were married in Shanghai on March 29, 1947. (R. 69) Eight days after their marriage they came together to San Francisco where Mr. Harrington was assigned to duty at the Navy Dispensary on Fell Street. (R. 69-70) In 1951 Mr. Harrington left the Navy and took civilian employment as a laboratory technician. (R. 70-72) About three years before his death he became chief laboratory technician at St. Luke's Hospital in San Francisco, a job in which he was "very interested." (R. 72-73, 76) Mr. Harrington was a "ham" radio operator and had considerable radio equipment in the house. (R. 76, 155) Mrs. Harrington shared this hobby with her husband and was also a licensed radio operator. (R. 76) Mr. Harrington had no serious health problems. (R. 174) At the time of his death he was earning approximately \$1,200 a month and during 1960 the family finances had improved so that Mr. Harrington could indulge in the luxury of increasing his gun collection. (R. 77) He was not addicted to alcohol or drugs; never inflicted violence upon Mrs. Harrington; and did not leave a suicide note. (R. 128-129) Mrs. Harrington testified that she and Mr.

Harrington "loved each other very deeply and were happy." (R. 129)
She knew of no reason why he would have wanted to take his own
life. (R. 129)

On the evening of his death, Mr. Harrington was seated on
the living room couch cleaning the most recent addition to his gun
collection, a German Mauser semiautomatic hand gun. (R. 89, 177)
He was drinking a highball, but was not intoxicated. (R. 89, 115,
145, Ex. 6, p. 8) (Mr. Harrington's alcohol blood level was 0.14
per cent. (R. 194)) The gun was equipped with a safety mechanism
operated by a lever situated alongside and to the left of the hammer.
(Ex. 1) With the hammer in the safe or forward position, although
the hammer would fall upon release, a cam device prevented the
hammer from contacting the firing pin. (R. 211-212) The hammer
could be released from the cocked position and caused to fall to
the firing position in three ways - (1) by trigger pressure, (2) by
"fanning" or pulling the hammer back slightly from the cocked
position and releasing it, and, (3) by moving the safety lever
forward from the fire position to the safe position. (R. 103)
Appellant's expert, Frank Chow, who sold the gun to Mr. Harring-
ton on January 14, 1960, described the safety mechanism as
"really a very safe safety." (R. 211) He said that he had explained
to Mr. Harrington how the safety worked. (R. 210, 212) He also

said that it would be impossible for the gun to fire with the safety mechanism on safe (R. 210, 215-216) and that it was not unusual for owners of guns of this type to rely completely upon the safety mechanism. (R. 210)

The gun was examined by experts for both parties following the incident and before trial. No defect or malfunction was found. (R. 110, 221, 228) There was expert testimony that in drawing the hammer back to the cocked position with the thumbs of both hands, the safety lever could, inadvertently, be pulled from the safe position (R. 108) and that this could happen in cocking the gun with only one hand. (R. 110) Defendant's expert, Mr. Chow, testified as follows:

"Q. (By Mr. Decker): Mr. Chow, assuming that this particular gun had been fully loaded and the handler of it had been producing this noise without discharging it (demonstrating), then it would be your opinion that the safety mechanism was on full safe?

"A. Then it would have to be on full safe. Otherwise it would discharge.

"Q. Right. Now, in your experience with the gun, what kind of an explanation could you give which would account for the gun being placed in the firing position, or, at least, in a position close enough to it so that it would fire, without the actor intending to do that? Do you understand my question?

"A. Yes, I do. It's like anything else, a safety can be pushed off because you want to push

it off, manually, and it could be - under certain circumstances, it could be brushed off. There could be a lot of things could happen. That is, an accident is an accident.

"Q. You are referring now to the factor of human error involved?

"A. That's right, human error.

"The Court: What you are saying is that it could unintentionally be moved from a safe position to a firing position?

"The Witness: That's the only way the weapon would fire, is to move it, so if you move it, it has to be moved either intentionally or unintentionally, or accidentally, or whatever it is.

"Q. (By Mr. Decker): Could you illustrate how this might have been done unintentionally?

"A. Well, as you know, once you have taken it off the safe it moves rather smoothly, so that could be done in many ways. It could be caught in your clothes, a sleeve; it could be caught on - it could be caught on (inaudible). He could be cleaning it. There's lots of things that could cause it. That comes in the realm of "one of those things."

"Q. You wouldn't consider this to be an impossible thing to happen, would you sir?

"A. Nothing is impossible, sir.

"Q. I notice, among other things, that in cocking this gun, one has to pull the hammer back to this position.

"The Court: Would you do this where Mr. Murray can see you?

"Mr. Decker I am not intentionally hiding it, your Honor.

"The Court: I know that.

"Q. (By Mr. Decker): I notice that in order to place a gun into a firing position, if there has been no prior discharge of the gun to automatically put it in that position, one has to pull the hammer back in this fashion, isn't that so?

"A. Yes, if it has not been cocked previously, yes.

"Q. In your opinion, would it be a reasonable possibility - a reasonable possibility - that in doing that, the handler of the gun might inadvertently pull the safety mechanism back to the firing position?

"A. It is possible."

(R. 218-220)

While he was seated to her left on the living room couch, Mrs. Harrington heard Mr. Harrington producing a "clicking" noise comparable to the noise caused when, with the hammer in the cocked position and the safety lever in the safe position, the hammer is released and permitted to fall to the firing position. (R. 90) Mr. Harrington then arose and moved to a standing position in front of her across the coffee table which sat in front of the couch. (R. 91, 178-179) Mrs. Harrington testified she thought she heard more "clicking" noises while he was standing in front of her. (R. 91) She looked up and saw him standing before her with the gun in his right hand, and asked him not

to continue - that he was making her nervous. (R. 91-92) (Mrs. Harrington did not share her husband's interest in guns - she didn't like them (R. 79) and, according to her son, Arnold, Jr., "She said she did not want them laying around the house or anything like that. She said she did not want them loaded.") (Ex. 6, p. 6.) Mrs. Harrington then looked away. (R. 92, 184) Mr. Harrington continued clicking the gun "...because he knew it annoyed me" and she asked him a second time not to do it. (R. 94-95) His response was to say, "Don't worry, the safety is on - I will prove it to you." (R. 95) With this, she looked up to see him put the gun to his right temple. (R. 95, 116, 184-185) Immediately the gun discharged and he fell to the living room floor. (R. 118, Ex. A-1, R. 144) At the time the fatal incident occurred, Mr. Harrington was standing directly in front of his son, Arnold, Jr., who was seated facing the living room doing his homework. (Ex. 6, pp. 9-11; Exhibit 1 to the deposition of Mrs. Harrington)

Mrs. Harrington, when asked to describe Mr. Harrington's appearance as he fell, said, "I remember very markedly that he looked at me with great surprise on his face and he threw up his hands as he fell." (R. 118)

Mrs. Harrington gathered the children together in the

bedroom and called the police. (R. 86, 120-121) (Arnold, Jr., described by Officer Tognetti as a "very, very intelligent boy for that age," said that after the shot his mother called the police and, "I took hold of my sisters and brothers and the dog, and took them to the bedroom." (Ex. 6, p. 15)

According to Mrs. Harrington the first policeman to arrive, Officer Swinford, came within "ten minutes or so." (R. 121) Officer Swinford testified that at 10:32 P.M. he received a radio call from the office of the South San Francisco Police Department to his patrol car then located at Grant Avenue and Maple Street in South San Francisco. He proceeded immediately to the Harrington residence. This took "a maximum of five minutes." (R. 131) Upon his arrival, Mrs. Harrington was outside her home. He asked her what had happened. She replied "My husband just shot himself, but he didn't mean it." (R. 135)

The officers found the gun on the living room floor near the coffee table. The hammer was in the rear, or cocked, position. (R. 138, 149-150) The safety lever was in the rear, or fire, position. (R. 149) The experts agreed that this is the condition the gun would return to if, with a live round in the firing chamber, the magazine fully loaded, and the safety lever in the fire position, the gun was discharged by permitting the hammer

to fall from the cocked position. (R. 213-214, 236)

Officer Tognetti testified that there was no sign of a struggle and the house appeared to be well kept and neat (R. 154-155)

ARGUMENT

1. THE TRIAL JUDGE CORRECTLY DETERMINED THE FACTUAL ISSUE OF ACCIDENTAL DEATH

In his memorandum opinion, the trial judge recites his findings which negate suicide and lead to the conclusion that Arnold Harrington's death was the result of accidental bodily injury. The latter conclusion, he notes, follows from his findings that the gun had a reliable safety mechanism; that prior to discharge of the gun Mr. Harrington had been manipulating it and causing the hammer to fall toward the firing pin with the safety lever in a safe position without causing the gun to discharge; and that discharge of the gun was occasioned by inadvertent displacement of the safety lever from the safe position to the firing position just before he put the gun to his head. Thus, according to the trial judge's findings, the displacement of the safety lever was a mistake -- something unexpected -- which placed Mr. Harrington's death in the accidental category.

In asserting again on this appeal that the facts of this case leave no room for determination by the trier of fact that Mr. Harrington's death was accidental. Appellant relies on two lines of cases.

One line consists of decisions from other jurisdictions holding deaths resulting from such fate-tempting conduct as playing "Russian roulette," or handling poisonous snakes, to be non-accidental. These are the Allred, Kinavey, Ford, Baker, and Thompson cases cited and discussed at pages 21 through 25 of Appellant's brief. In these cases the voluntary conduct of the deceased was such that, viewed by the objective standard of the reasonable man, death was the foreseeable result.

The other line of cases relied upon by Appellant are those wherein appellate courts have held that deaths resulting from altercations involving gun play initiated by the insured to be non-accidental. This line of cases includes the Postler, Price and Eraldi cases cited and discussed by Appellant at pages 20 and 21 of said brief.

It is from the language of these authorities that Appellant has culled the rule,

"...when a man voluntarily and needlessly performs an act so dangerous to human life that death follows as a foreseeable consequence, death, when it occurs, is not accidental." (Appellant's Brief, p. 19)

Appellant's argument that this rule precludes recovery by Appellee herein is unsound and does not require lengthy answer.

The principal vice of this argument is simply that it ignores the trial court's finding that Arnold Harrington's voluntary act was not one so dangerous to human life that the reasonable man would consider death a foreseeable result thereof. Webster defines "voluntary" as follows:

1. Proceeding from the will, or from one's own choice or full consent; produced in or by an act of choice; as voluntary action. (Webster's International Dictionary, Second Revised Edition.)

It may reasonably be inferred from the evidence that the act which proceeded from Mr. Harrington's will or his own choice or full consent, was that of putting a loaded gun to his head which, because it was on safe and the safety mechanism was reliable and effective, would not discharge even though the hammer was released. Such a voluntary act was not one "so dangerous to human life that death follows as a foreseeable consequence."

In order for the trial court to determine the issues of suicide and accidental death, it was, of course, necessary to inquire into the insured's state of mind at the time he placed the gun to his head. But to inquire into decedent's state of mind was not, as contended by Appellant, to apply "the subjective standard of the state of mind of the insured" rather than the "objective

standard of foreseeability to the reasonable man." (Appellant's Brief, p. 28) It is clear from a reading of the opinion of the trial judge that, in determining Mr. Harrington's death to be accidental, the court did not rely solely upon a finding that Mr. Harrington's state of mind was not one of anticipating that death would attend his action. The trial judge not only relied upon his finding that Mr. Harrington did not anticipate death but also upon his finding that such lack of anticipation was reasonable under all the circumstances. The trial judge applied the objective standard of foreseeability to the reasonable man. This is clearly indicated by the following quote from the opinion.

"If, as expert testimony showed here, the gun had a safety mechanism which reasonably could be anticipated to prevent firing, and consequently death, when properly used, then it cannot be said that death was the foreseeable result of pointing the loaded gun if the one pointing the gun thought, and had good reason to believe, that the gun was in that condition."
(R. 30)

Since Mr. Harrington's voluntary act was not one of initiating gun play as was the case in the California cases of Postler, Price and Eraldi, and since Mr. Harrington's voluntary act was not the fate-tempting type of conduct which invites foreseeable death such as that described in the extra-jurisdictional cases relied upon by Appellant, there can be no question

but what the trial court correctly applied the California authorities which hold death to be accidental when the events leading thereto contain a causal element which it may be inferred from the evidence, was not foreseen or expected by the insured and which the insured reasonably could not be expected to have foreseen or expected.

Cox v. Prudential Insurance Company of America
(1959) 172 C.A. 2d 629, 636, 343 P. 2d 99

Stokes v. Police and Firemen's Ins. Assn. (1952)
109 C.A. 2d 928, 935, 243 P. 2d 144

Also, having determined the nature of the decedent's voluntary act, the court correctly applied the well-established California rule that the death of an insured may be deemed accidental if caused by . . . "a casualty - something out of the usual course of events, and which happens suddenly and unexpectedly and without any design of the person injured."

Richards v. Travelers Insurance Co. (1891) 89 C.
170, 26 P. 762

Rock v. Travelers Insurance Co. (1916) 172 C.
462, 156 P. 1029

Losleben v. California State Life Insurance Co.
(1933) 133 C.A. 550, 24 P. 2d 825

Rooney v. Mutual Benefit Health and Accident
Association (1946) 74 C.A. 2d 885, 170 P. 2d 72

2. THE TRIAL COURT'S FINDING OF ACCIDENTAL DEATH RESTS UPON SUFFICIENT EVIDENCE

A. There Was No Erroneously Admitted Evidence

Rule 43(a) in the Federal Rules of Civil Procedure is not a rule of exclusion. Hence, the rule, whether federal or state, which favors reception in evidence governs. Rule 43(a) is to be liberally construed and doubtful cases should be resolved in favor of the admissibility of evidence.

Monarch Insurance Co. of Ohio v. Spach
(CCA 5, 1960) 281 F.2d 401

New York Life Insurance Co. v. Schlatter
(CCA 5, 1953) 203 F.2d 184

Mrs. Harrington testified that Mr. Harrington told her, before the gun discharged, that the gun was on safe and tried to show her this. Appellant contends this to be inadmissible hearsay. Decedent's statement that the gun was on safe was admissible to indicate, not whether the gun was, in fact, on safe or not, but to show that he thought that it was on safe. Such a statement on his part is highly relevant circumstantial evidence bearing on the factual issue of suicide. It is also highly relevant circumstantial evidence bearing upon the issue of accidental death. The declaration was admissible because it was not offered to prove the truth of the matter stated and therefore is not within the hearsay rule at all. (See 6 Wigmore, Sec. 1766)

In Witkin, California Evidence, the rule is stated as follows.

"Frequently an utterance may justify an inference concerning a fact in issue, such as belief, intent, motive, etc., of the declarant, regardless of the truth or falsity of the utterance itself. It is admitted as circumstantial evidence of that independent fact. (See generally, McCormick, pp. 465, 567, 586; 6 Wigmore, 1715, 1790; Selected Writings, p. 763; 66 Harvard Law Review, 498, 501.)"

Witkin, California Evidence, p. 243

And, in Whitlow v. Durst (1942) 20 C.2d 523, 127 P. 2d 530, Justice Traynor states the general rule as follows:

"When intent is a material element of a disputed fact, declarations of a decedent made after as well as before an alleged act that indicate the intent with which he performed the act are admissible in evidence as an exception to the hearsay rule, and it is immaterial that such declarations are self-serving."

Counsel for Appellant strain to find inferences to support their conclusion that the declaration was made under suspicious circumstances. They argue, in effect, that the declaration is untrustworthy because Mr. Harrington intended to take his own life and, with brilliant foresight and knowledge of the law, staged an accident in order to protect his widow's right to double indemnity benefits!

But the evidence much more convincingly indicates that Mr. Harrington, intrigued by the unique safety mechanism of his new gun, and aware of his wife's fear thereof, was amusing himself and, at the same time, attempting to goad his wife into breaking her silence by releasing the hammer with the gun loaded but on safe. This caused the "clicking" noise which she heard. Then, he pursued her attention by standing before her and continuing this process. When she rose to the bait and remonstrated with him, he continued the game, intending to frighten her even more. And then the unexpected occurred. Perhaps the drink or two he had consumed, or the distraction created by his wife's response, caused the fatal slip. In any event, something went awry - the safety lever became displaced, and the gun discharged.

Viewing the evidence in this light, the circumstances are drained of suspicion and no error appears in the exercise by the trial judge of his discretion in admitting the declaration as a trustworthy item of evidence.

Another item of evidence which counsel contend was erroneously admitted was Mrs. Harrington's description of the appearance of her husband's facial appearance as follows:

"He looked at me with great surprise on his face."

There was no error in the admission of this evidence.

If the subject is one on which the ordinary person has some knowledge and experience, and the facts cannot be accurately or adequately stated, so that the witness can only testify to what he knows by giving an opinion, it may be admitted.

(Healey v. Visalia & T. R. Co. (1894) 101 C. 585, 36 P. 125)

Moreover, the opinions of non-expert witnesses are admitted as a matter of practical necessity when the matters which they have observed are too complex or too subtle to enable them accurately to convey them to court or jury in any other manner.

(Manney v. Housing Authority (1947) 79 C.A. 2d 454, 180 P.2d

69) The situation is analogous to that in Peo. v. Beacon (1953) 117 C.A.2d 206, 255 P.2d 98 wherein a witness testified to the "spirit or tenor of voices" that he heard in a room directly above his own. He stated that the voices denoted "anger." The court held that this was proper, stating -

"Anger, like speed or sobriety, must be described as a conclusion... How 'anger' could be evidenced by other than characterizing it as such is difficult to see. Anger is the fact, not the voices that evidenced the anger. Every attempt at analyzing the voices heard would reproduce the same objection here made, if it were a good one."

Finally, Appellant asserts that Officer Swinford should

not have been permitted to testify that when he arrived at the Harrington home moments after the incident, Mrs. Harrington told him, "My husband just shot himself, but he didn't mean it."

It may reasonably be inferred from the evidence that this assertion was made within six minutes from the time Mrs. Harrington had seen her husband drop to the floor having just met his death in a manner which could only have been an unexpected and tremendously shocking and frightening experience for her. All of the conditions requisite to invocation of the "spontaneous exclamation" exception to the hearsay rule (startling event, statement during excitement and statement related to event) could reasonably have been found to be present. (See Witkin, California Evidence, pp. 297-298.)

Moreover, the rule is that the determination as to whether the requisite conditions for admissibility as a spontaneous exclamation are present is for the discretion of the trial judge; the trial judge is better equipped to pass upon admissibility than the appellate court. (Dolberg v. Pacific Electric Railway Co. (1954) 126 C.A.2d 487, 272 P.2d 527)

With respect to Appellant's contention that the phrase "...but he didn't mean it" constitutes inadmissible opinion evidence, we deem it a sufficient answer to point out that counsel

for Appellant have cited no California authority for the proposition that the court should apply the exclusionary opinion rule to evidence admitted under the spontaneous exclamation exception to the hearsay rule. There is conflict elsewhere on this point but the better view seems to be that the opinion rule should not be applied in this situation. See McCormick, p. 583; 1955 Survey of American Law, 629; 1957 Survey of American Law, 548; 163 A.L.R. 186; 53 A.L.R. 2d 1287.

B. Any Error Which The Trial Judge May Have
Made in The Admission of Evidence was
Harmless.

Rule 61, Federal Rules of Civil Procedure, provides,
in part, as follows:

"No error in either the admission or exclusion of evidence* * * is ground for granting a new trial or for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not effect the substantial rights of the parties."

Where evidence erroneously admitted is merely cumulative of other evidence which, alone, suffices to support the determination of the trial court, such error is harmless under the above rule. (Eckis v. Graves Tank and Manufacturing Co., (CCA

9, 1951) 289 F. 2d 335) In this case, the determination of accidental death rests upon much evidence other than that which Appellant contends was admitted erroneously. Accidental death could reasonably have been inferred from the evidence negating suicide and the evidence of the characteristics of the gun and decedent's manipulation of same. In New York Life Insurance Co. v. Dick, (1958) 359 U.S. 437, 79 S. Ct. 921, the insured died from injury inflicted by discharge of a shotgun. There were no witnesses to the fatal incident. The only evidence to support the jury's determination that death was accidental was certain evidence negating suicide as an explanation and testimony that the gun in question was unreliable. The Supreme Court held this evidence sufficient to support the verdict in plaintiff's favor, reversed the Circuit Court of Appeals, and reinstated the judgment of the trial court.

We submit that, disregarding the evidence which Appellant contends was erroneously admitted, there is more than sufficient evidence in the record to support the trial judge's finding of accidental death.

CONCLUSION

The tendency of courts today, including those of California is to regard "accident" as Mr. Justice Cardozo characterized it in a dissenting opinion. He said, with reference to the tortured reasoning by which courts had purported to distinguish between deaths resulting from "accidental means" and those resulting from mere "accident, -

"The attempted distinction between accidental results and accidental means will plunge this branch of the law into a Serbonian Bog. Probably it is true to say that in the strictest sense and dealing with the region of physical nature, there is no such thing as an accident. * * * On the other hand, the average man is convinced that there is, and so certainly is the man who takes out a policy of accident insurance. It is his reading of the policy that is to be accepted as our guide, with the help of the established rule that ambiguities are to be resolved against the company. * * * When a man has died in such a way that his death is spoken of as an accident, he has died because of an accident, and hence by accidental means. * * * If there was no accident in the means, there was none in the result, for the two were inseparable. * * * There was an accident throughout, or there was no accident at all."

(Dissenting opinion in *Landress v. Phoenix Mut. L. Ins. Co.* (1934) 291 U. S. 491, 54 S. Ct. 461, quoted with approval in *Cox v. Prudential Ins. Co.* (1959) 172 C. A. 2d 629, 637-8, 343 P. 2d 99.)

California courts have never abandoned the distinction.

(*Zuckerman v. Underwriters at Lloyds* (1954) 42 C. 2d 460, 476-7, 267 P. 2d 777, 784) Thus, it is certainly arguable that, because recovery of double indemnity in this case does not depend upon proof of death by "accidental means", plaintiff's burden was only

to establish that the insured did not anticipate that death would be the result of his act. There is considerable California authority to support the proposition that, in a case where the benefit is payable upon proof of mere accident, the test is the purely subjective one of anticipation by the insured. (Rock v. Travelers Ins. Co. (1916) 172 C. 462, 465, 156 P. 1029, 1030; Olinsky v. Railway Mail Ass'n. (1920) 182 C. 669, 672, 189 P. 835, Davilla v. Liberty Life Ins. Co. (1931) 114 C. A. 308, 299 P. 831, 833, Losleben v. California State Life Ins. Co. (1933) 133 C. A. 550, 24 P. 2d 825; Dark v. Prudential Ins. Co. (1935) 4 C. A. 2d 338, 40 P. 2d 906 908; Zuckerman v. Underwriters at Lloyds (1954) 42 C. 2d 460, 476-7, 267 P. 2d 777, 784)

We submit that whether the test is the purely subjective one, or that of foreseeability to a reasonable man, the evidence in the case at bar is more than sufficient to support the finding of accidental death. Justice Cardozo's observation - that an occurrence is accidental if the average man would characterize it as such - is pertinent here because it provides an approach which is helpful in guiding us through the "semantic and polemical maze" (166 A. L. R. 469, 477) created by the decisions in this area and relied on by Appellant.

The evidence in this case most certainly is such that the average man, considering same, could reasonably conclude that Mr. Harrington's death was an accident and characterize it with

that term.

We conclude that, for this reason, and for all the other reasons stated above, the judgment below should be affirmed.

Dated: October 30, 1961

Respectfully submitted

ALLAN BROTSKY
CHARLES W. DECKER

Attorneys for Appellee

(Appendix Follows)

MEMORANDUM FOR JUDGMENT

This is an action for double indemnity benefits in the amount of \$15,000 under two policies of insurance issued by the defendant, New York Life Insurance Company, to Arnold Harrington, the deceased, as insured. The single indemnity life insurance benefits under the policies have already been paid to Mr. Harrington's widow and the beneficiary, Joyce A. Harrington, the plaintiff in this action, and there is no dispute concerning those benefits.

Mr. Harrington was fatally injured by a self-inflicted gunshot wound on February 5, 1960, and died the same day. This action was commenced on August 17, 1960, by the filing of a complaint in the Superior Court of the State of California, in and for the City and County of San Francisco. On August 29, 1960, the action was removed to this Court by defendant pursuant to the provisions of 28 U.S.C. Sec. 1441(a). This Court has jurisdiction of the action under the provisions of 28 U.S.C. Sec. 1332.

The sole issue in the case is whether the death of Arnold Harrington "resulted directly, and independently of all other causes, from accidental bodily injury * * *" within the

meaning of the double indemnity provisions of the policies. The plaintiff submitted appropriate proof of death in which plaintiff represented the cause of death to be "accidental shooting." In its answer defendant has declined to pay the double indemnity benefits. There is also lurking in the record under this defense (though not vigorously made) the suggestion by the defendant that the death was the result of suicide and therefore excluded under the double indemnity provisions of the policies. The parties agree that this case is controlled by the California law on the subject, since the contracts of insurance were issued in California, and the incident, which is the subject of this suit, occurred in California.

The facts, which are practically undisputed, are as follows:

Mr. Harrington, the insured, was a laboratory technician by occupation and was thirty-eight years old. He was married to the plaintiff herein, and as the issue of that marriage there were five children living in the home, the eldest being age eleven. He was happy in his occupation, which at the time of his death was bringing him an income from \$1,000 to \$1,200 per month. His financial condition was relatively good, in that other than secured obligations for payments

on his home and automobile, and current living expenses, all of which were currently in good standing, he had no financial obligations. His health and the health of his family were good, with the exception that he had an ulcer which was in a controlled condition. His family relationship appeared to be a happy one. There is no history of suicidal threats or tendencies. He had a hobby of collecting guns. Mrs. Harrington was fearful of guns, and did not participate in her husband's hobby. At the time of his death he was the owner of a number of rifles and hand guns of various types, among them the German Mauser semi-automatic pistol with which he fired the fatal shot. Mr. Harrington fired his guns frequently at a firing range, was quite familiar with them, was an expert shot, and prided himself upon his knowledge of guns. On the day of his death Mr. Harrington had been home from work with an adverse reaction to a flu shot, and he had a minor quarrel with his wife concerning her overstaying a visit with a girlfriend. Mr. Harrington had been drinking, but did not appear to be intoxicated. The quarrel continued and Mr. Harrington left the house in anger, returning approximately an hour later. Upon his return Mrs. Harrington refused to make up with her husband or to reply to him. At that time present in the room was the oldest child, a

son aged eleven. Mr. Harrington, saying words to the effect that he might as well do something he enjoyed, started handling the Mauser semi-automatic pistol. The pistol was loaded with one shell in the barrel, or firing chamber, and eight or nine shells in the magazine. He was causing the gun to make a clicking noise. According to the evidence this could have been done in one of three ways, all of which involved causing the hammer to be released from a cocked or semi-cocked position to firing position, while the safety lever was on safe. The safety mechanism on the gun was so designed that even though the hammer dropped toward the firing pin it would not strike the firing pin while the safety lever was in the safe position. After a number of clicks Mrs. Harrington requested him to stop, saying in substance "Please don't do that, you know it makes me nervous" or "you know it's dangerous," to which Mr. Harrington replied that the gun was safe, and "see, I'll show you." Whereupon he placed the gun to his head and the gun fired, causing the gun shot wound through his head which caused his death shortly thereafter.

There was expert testimony concerning the condition of the gun and the operation of its mechanism. The significant factors are that there was little, if any, probability that

the gun would fire when the safety lever was in the position of safe, one witness saying the chances were a million to one, and that this was so regardless of how the hammer was released; that the only way the gun could be fired was when the safety lever was in a fire position; that as a matter of general safety practice with respect to firearms it was "dangerous" to point a firearm loaded, or unloaded, with the safety on, or off, at any vital part of the body. Under these circumstances the Court finds:

(1) That the death was produced by a gun shot wound, which was caused by the voluntary act of the deceased;

(2) That deceased knew the gun was loaded, but he thought the safety lever was in a safe position and that the gun would not fire in that condition, and, further, that the gun could be pointed at his head safely in the condition;

(3) That at the time of the firing the safety lever of the gun was in the fire position, but that this condition was unknown to and unexpected by the deceased; and

(4) That the deceased had no intention to take his own life.

Under these facts plaintiff contends that death occurred from "accidental bodily injury," and defendant

contends that as a matter of law death could not have so occurred because the act of pointing a loaded gun at his head by the deceased was either suicidal or so inherently dangerous that death followed as a foreseeable consequence.

While defendant suggests that the conduct of the deceased might have been suicidal, the main thrust of its argument is based upon the proposition that the death was non-accidental because of the performance of a dangerous act from which death was a foreseeable consequence. Defendant's reluctance to strongly urge that the death was the result of a suicidal act is confirmed by the evidence. Other than the minor family quarrel which occurred on the day of the shooting, there was no factor in Mr. Harrington's life which either directly or indirectly supports the inference that he intended to take his own life at the time of the shooting, or at any other time. Such factors as his condition of health, his financial status, his family status, and his mental condition, are all negative on the question of suicidal intent. The act of pointing a loaded gun, which he thought was safe, at his head, which might be characterized as foolish or dangerous, under the circumstances in which it occurred in this case is not suicidal. Plaintiff, therefore, has carried the burden that the

death was not the result of suicide.¹ See *Wilkinson vs. Standard Acc. Ins. Co.*, 180 C. 252; *Canada Life Assurance Co. vs. Houston*, Cir. 9, 1957, 241 F. 2d 523.

The other portion of the defendant's contention raises a more difficult question, namely, whether under the circumstances of this case the non-suicidal death was caused by accidental bodily injury. In this situation it is the duty of this Court to determine what the courts of last resort of the State of California would hold under the facts of this case. In *Young vs. Aeroil Products Co.*, Cir. 9, 1957, 248 F. 2d 185, the court said at page 188:

"Preliminarily, it should be noted that the law of California governs the substantive issues in this case. It was in that state that the machine was purchased and used and where the fatal accident occurred. It is our limited duty to discern the substantive law of California on the issues in controversy and to apply it accordingly. Our task is not to innovate, but to imitate. Where the course of the law remains

¹In its brief defendant asserts that the burden of showing that death was not the result of suicide was on the plaintiff, citing *Zuckerman vs. Underwriters at Lloyd's*, 42 C. 2d 460 (1954). If defendant's assertion is the holding of the *Zuckerman* case plaintiff here has met that burden. It is unnecessary for this Court to determine whether or not the *Zuckerman* case so holds.

"uncharted, as is the situation with several of the issues in the instant case, it is the duty of the Federal court to examine germane precedents and analogous decisions in California and to endeavor to ascertain from those decisions how the California courts would decide the case at bar. In the absence of direct authority, we must heed such guideposts as the state courts have constructed, for even here true allegiance to principle of *Errie Railroad Co. vs. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L. Ed. 1188 precludes unrestrained and independent determination in a diversity case."

There are a number of California cases dealing with the interpretation of insurance policies which provide for death payments as the result of accidental deaths. Careful research by counsel and by the Court fails to disclose any California case which closely resembles this case on its facts and it would be difficult to say with certainty what the California courts would hold under these circumstances. The California cases seem to make a distinction between insurance policies which insure against accidental death, and a death caused by accidental means, holding that those policies which insure against death from accidental means require proof not only "that death or injury should be unexpected or unforeseen,

"but there must be some element of unexpectedness in the preceding act or occurrence which leads to injury or death."

Rock vs. Travelers' Ins. Co. 172 C. 462.

There is a suggestion in later California cases that this distinction no longer is valid. Cox vs. Prudential Ins. Co., 172 C. A. 2d 629, 637. See also: Zuckerman vs. Underwriters at Lloyd's, 42 C. 2d 460, 473. In any event the distinction is of no moment in this case, because the policy in this case insured against death from accidental bodily injury, and would fall in the "accidental results" type of case as distinguished from the "accidental means" type of case, the latter requiring a greater quantum of proof. It is the conclusion of this Court that the proof in this case is sufficient to establish that death resulted from accidental bodily injury under either standard.

This conclusion is based upon the definition of "accidental" as that term is used in accident insurance policies. The earliest California case dealing with the definition of this word in the context of insurance cases is Richards vs. Travelers Ins. Co., 89 C. 170, where the court said

"It is impossible to give a precise definition of the word 'accidental.' As every effect has a cause, there is one sense in which nothing is accidental.

"Accident policies are of recent origin, and there have been only a few judicial decisions with respect to them. But the authorities to be found on the subject seem to be to the point that 'accident' must be given its popular meaning; that is, a casualty - something out of the usual course of events, and which happens suddenly and unexpectedly, and without any design on the part of the person injured. The fullest discussion of the subject is to be found in the opinion of the United States circuit court for the district of Michigan, in the case of Ripley vs. Railway Company, 2 Bigelow's Life & Acc. Ins. Cas. 738. In that case the insured had been attacked by highwaymen intended violence, there was no accident. The learned judge (Withey, J.), in delivering the opinion of the court, says: 'Perhaps, in a strict sense, any event which is brought about by design of any person is not an accident, because that which has accomplished the intention and design, and is expected, is a foreseen and foreknown result, and therefore not strictly accident. Yet I am persuaded this contract should not be interpreted so as thus to limit its meaning; for the event took place unexpectedly, and without design on Ripley's part. It was to him a casualty, and in the more popular and common acceptance, 'accident,' if not in

"its precise meaning, includes any event which takes place without the foresight or expectation of the person acted upon or affected by the event * * * I think, in construing a policy of insurance against accident, issued to all sorts of people, a majority of whom do not, as the company well knew, nicely weigh the meaning of words and terms used in it, courts are called upon to interpret the contract as a large class not versed in lexicology are sure to regard its terms and scope. That which occurs to them unexpectedly is by them called accident. The company fix the terms of the contract and are to be held, in the absence of plain unequivocal exceptions and provisions, to intend what, in popular acceptance, the insured party is likely to understand by its terms.' In that case judgment went for defendant upon another point, and was affirmed by the United States supreme court, where the meaning of 'accident' was not discussed (16 Wall. 336); but the language of Judge Withey seems to us to express correct views of the question." (89 C. 175-176.)

This definition, "a casualty - something out of the usual course of events, and which happens suddenly and unexpectedly, and without any design on the part of the person insured," has been repeated often in the many California cases

which have subsequently dealt with the problem. Some of these cases are *Price vs. Occidental Life Ins. Co.*, 169 C. 800, 802; *Rock vs. Traveler's Insurance Co.*, *supra*; *Rooney vs. Mutual Benefit H. & S. Ass'n.*, 74 C. A. 2d 885, 888; *Zuckerman vs. Underwriters at Lloyd's*, *supra*; and *Cox vs. Prudential Ins. Co.*, *supra*. The essence of defendant's position is that the deceased invited death by engaging in conduct so inherently dangerous that death was the foreseeable result. In support of its position defendant cites *Postler vs. Traveler's Ins. Co.*, 173 C. 1, overruled on other grounds in *Zuckerman*, *supra*; *Price vs. Occidental Life Ins. Co.*, *supra*; and *Eraldi vs. No. Am. Acc. Ins. Co.* (N. D. Cal. 1937), 20 F. Supp. 735. In all of these cases the deceased started an altercation, which resulted in the death of the deceased caused by a shot from a gun fired by the other person to the altercation. In each of these cases the court held that in a case where the deceased invited death from a deadly weapon in the hands of another person the killing was a natural and probable consequence of his own voluntary act, and not an accident. In *Postler*, *supra*, the court said:

"The appellant contends, and we think upon good ground, that under any reasonable view of the evidence, the

"injuries suffered by Postler were not produced by accidental means, but were the natural and probable consequence of his own voluntary acts. In *Western Commercial Travelers' Assn. vs. Smith* (85 Fed. 401, 405, (40 L.R.A. 653, 29 C.C.A. 223)), the court said that 'an effect which is the natural and probable consequence of an act or course of action is not an accident, nor is it produced by accidental means. It is either the result of actual design, or it falls under the maxim that every man must be held to intend the natural and probable consequence of the means which produced it * * *' (See also, 4 *Cooley's Briefs on Insurance*, p. 356; *Fidelity etc., Co., vs. Stacey's Exrs.*, 143 Fed. 271, (6 Ann. Cas. 955, 5 L.R.A. (N.S.) 657, 74 C.C.A. 409); *Price vs. Occidental Ins. Co.*, 169 Cal. 800, (147 Pac. 1175); *Rock vs. Travelers' Ins. Co.*, 172 Cal. 462 (156 Pac. 1029); *Hutton vs. State Accident Co.*, 267 Ill. 267 (Ann. Cas. 1916C, 577, L.R.A. 1915E, 127, 108 N.E. 296); *Prudential Casualty Co. vs. Curry*, 10 Ala. App. 642 (65 South. 852).) In *Price vs. Occidental Life Ins. Co.*, we had occasion to deal with a situation somewhat similar to the one before us. The insured had been killed by the discharge of a revolver held in the hands of another person. It was held that 'if it should appear that the killing had been the result of

"an encounter with deadly weapons, and that the deceased had himself invited and brought on such conflict, the fatal result would not have been accidental so far as he was concerned. ' The decision of the United States circuit court of appeals in Taliaferro vs. Travelers' Protective Assn. of America (80 Fed. 368 (25 C. C. A. 494)), was cited with approval. There the court upheld a directed verdict in favor of the insurance company, it appearing that the insured had invited another to a deadly encounter which had resulted in his killing. Under the undisputed facts, we do not see how the case at bar can be taken out of the principle of those just referred to. Postler, after arming himself and declaring his intention of getting back his money, had gone to the gambling house and had there undertaken to compel the payment of one thousand dollars at the point of a pistol. While he was engaged in this effort, an encounter took place between him and one of the men who was in the place when he arrived. In the course of this encounter he was killed.

"A man who attempts to obtain money from others by the display of a deadly weapon, aiding such display by threats of killing, must contemplate, as the natural and probable consequence of his actions, that there will be resis-

"tance to or interference with the consummation of his plan, and that such resistance or interference will be likely to result in armed conflict and serious injury to one or more of the participants. To all intents and purposes, Postler's position, so far as concerns the probable consequences of his acts, was that of any man who attempts robbery at the point of a firearm. If such a man were killed by his intended victim, it could hardly be claimed that his death was caused by 'accidental means,' in the sense in which those words are used in policies like the ones before us. We are not suggesting that, from an ethical standpoint, Postler's action was to be judged by the standards which would be applied to the commission of an ordinary robbery. The conditions under which he had lost his money in gambling may have been such as to make him feel, whether rightly or wrongly, that he was justified in resorting to extreme and lawless measures in the effort to recoup his losses. But these considerations do not affect the ultimate question, which is whether the killing was the natural and probable consequence of his own voluntary acts. Under the authorities above cited, this question must be answered in the affirmative." (173 C. 4-5)

Plaintiff's position is that death in this case was

accidental because it was the unexpected and unforeseeable result of a voluntary act, and plaintiff urges that, although the deceased's voluntary act of pointing a loaded gun at his head was both dangerous and unnecessary, death was the result of the deceased's mistaken belief that the safety lever of the gun was in a safe position, and that, therefore, the gun would not fire.

In support of her position plaintiff cites a number of cases, among which are *Cox vs. Prudential Ins. Co.*, *supra*, and *Rooney vs. Mutual Benefit H. & S. Ass'n*, *supra*. In both of these cases the deceased had placed himself in a position of peril by a voluntary act of his own. In *Cox*, *supra*, the deceased had deliberately and voluntarily jumped out of a moving vehicle in which he was being transported as a prisoner by law enforcement officers, and was killed by a following vehicle. In *Rooney*, *supra*, the deceased started a fist fight, and was knocked to the ground and killed by striking his head against the sidewalk. Both of these cases are subsequent in time to the California cases cited by the defendant. Both quote from the case of *Losleben vs. Cal. State L. Ins. Co.*, 133 C.A. 550, 556, with approval:

"While an injury to an insured person may result in

"greater or less degree from an original voluntary act upon his part, if there is some evidence which justifies the inference that the means which produced the injury contained something of an unexpected or unforeseen character involving other acts not intentionally done, the resulting injury may be said to be caused through accidental means." (133 C. A. 556.)

In Rooney, *supra*, it is said:

"The rule in California is that each case must stand upon its own facts and that the legal principles enunciated as to what constitutes 'accidental means' as distinguished from 'accidental result' must be applied to such facts as appear in the particular case. These principles, applied to the facts of this case, do not support appellant's claim that when one invites a fistic encounter and sustains injury or death therefrom recovery cannot in any case be had upon policies of the character here involved. To prevent a recovery upon such a policy, it must be made to appear that in utilizing the means to which he resorted the insured knew or should have known that he would probably sustain the injury which resulted as a consequence thereof." (74 C. A. 2d 890.)

These more recent California cases seem to teach that, even though death may be the result of a voluntary act of

the deceased in which the deceased started in motion a perilous course of conduct, death may be accidental where there is some act or occurrence in the course of conduct which is unanticipated and unexpected by the deceased, and from which it cannot be said reasonably that death was the natural or probable consequences of such conduct. The cases are not clear on where reasonable foreseeability ends and the unexpected begins, but seem to leave that question to the facts of each case.

Here the facts would seem to support the conclusion of accidental death rather than death as the foreseeable result of a dangerous or perilous course of conduct. It does not require expert opinion to establish that it is dangerous or perilous to point a loaded gun at one's head in the parlance of general safety practices in the handling of firearms. However, this does not mean that every death which results from the performance of such conduct is not an accident. If, as expert testimony showed here, the gun had a safety mechanism which reasonably could be anticipated to prevent firing, and consequently death, when properly used, then it cannot be said that death was the foreseeable result of pointing the loaded gun if the one pointing the gun thought, and had good reason to believe, that the gun was in that condition. The conduct of the deceased

here could be called foolish, stupid, dangerous, perilous, unnecessary and many other characterizations of a similar import, but in the context of the surrounding circumstances it would require a strained appraisal of the facts to say that what occurred was not unexpected and unforeseen by him. Before he pointed the gun at his head he had been doing the same unsafe, mechanical manipulation with the gun by causing the hammer to be released toward the firing pin with the safety lever in a safe position without firing the gun. His announced purpose for putting the gun to his head was to demonstrate the safety of the gun in that condition. It was his mistaken belief that the gun was safe which produced the unexpected occurrence. It can be argued with some degree of plausibility that the deceased should have foreseen what probably happened here, namely, that somehow, in the manipulation of the gun he inadvertently moved the safety lever from a safe position to a fire position just before putting the gun to his head. In other words, should he have anticipated the mistake which caused his death? The answer is that in the common understanding an occurrence which happens as the result of a mistake is usually an accident. When weighing probabilities in this area the courts seem to require some element of certainty of the end result by the means used,

without the intervention of some act or occurrence of an unexpected nature, such as a mistake, before holding that death is a foreseeable consequence. Here the end result of death would not have occurred but for the mistaken and unexpected condition of the gun. The Court, therefore, concludes that death in this case resulted directly from accidental bodily injury.

Defendant has cited a number of cases from jurisdictions other than California which are not supported by the weight of authority in California, or are distinguishable on their facts. These cases are *Kinavey vs. Prudential Ins. Co. of Am.*, Pa. 1942, 27 Atl. 2d 286 (doing acrobatic stunts on the rail of a bridge while intoxicated); *Allred vs. Prudential Ins. Co. of Am.*, N.C. 1957, 100 S.E. 2d 226 (a fourteen year old boy killed as the result of laying down in the middle of a highway to show how brave he was); *Ford vs. Standard Life Ins. Co.*, Tenn. 1947, 12 C.C.H. Life, Health and Accident Cases 789 (handling a venomous snake under the religious belief he could handle such snakes without harm); *Thompson vs. Prudential Ins. Co. of Am.*, Ga. App. 1951, 66 S.E. 2d 119 (playing a form of "Russian roulette"); and *Baker vs. National Life & Acc. Ins. Co.*, Tenn. 1956, 298 S.W. 2d 715 (permitting a person to shoot at a can on the insured's head). There

should be added to the cited cases *Trivette vs. New York Life Ins. Co.*, Cir. 6, 1960, 283 F. 2d 441 (shooting self with pistol). What was said in *Cox*, supra, seems apropos here:

"Appellant cites several other cases in support of its contention that the death was not caused by accidental means. Those cases are factually distinguishable from the present case. It may be stated generally that in those cases the death was the direct result of the voluntary act of the insured (such as jumping from a high building or the top of a moving train) and no act of an intervening agency was involved; or that the death resulted from performing a daredevil stunt (such as handling a rattle snake, playing Russian Roulette, or permitting a person to shoot at a can on the insured's head) or that the death resulted from fighting with guns." (172 C. A. 2d 638.)

There are outside cases which seem to support plaintiff. See: *Aetna Life Ins. Co. vs. Kent*, Cir. 6, 1934, 83 F. 2d 685; and *Peppers vs. Sovereign Camp, W. O. W.*, Ga. App, 1936, 187 S. E. 215.

During the course of trial defendant objected to and moved to strike certain pre-death conversations by deceased and statements by plaintiff made shortly after the occurrence. The Court admitted the evidence and reserved ruling on the

objections and motions to strike. The objections are overruled, and the motions denied. At the conclusion of the plaintiff's case defendant moved to dismiss on the ground that the evidence, as a matter of law, did not establish that death occurred from accidental bodily injury within the meaning of the two insurance policies in question. Ruling was reserved. The motion to dismiss is denied.

Prior to the taking of evidence plaintiff requested the right to amend the pleadings to conform to proof on the question of interest. Plaintiff should forthwith present her proposed amendment, so that final judgment can be prepared and entered after the question of interest is determined.

Judgment is awarded plaintiff in the amount claimed, subject to the determination of the question of interest. Under the provisions of Rule 52(a) F.R.C.P. the findings and conclusions in this memorandum shall constitute the findings of fact and conclusions of law of the Court, except on the issue of interest, and counsel for plaintiff is directed to prepare and present a judgment in accordance herewith after the determination of the question of interest.

Dated: March 31, 1961.

/s/ OLIVER J. CARTER,
United States District Judge

(Endorsed): Filed March 31, 1960.

No. 17398

In the
United States Court of Appeals
For the Ninth Circuit

NEW YORK LIFE INSURANCE COMPANY,
a corporation,

Appellant,

vs.

JOYCE A. HARRINGTON,

Appellee.

Reply Brief for Appellant

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In the

United States Court of Appeals

For the Ninth Circuit

NEW YORK LIFE INSURANCE COMPANY,
a corporation,

Appellant,

vs.

JOYCE A. HARRINGTON,

Appellee.

Reply Brief for Appellant

The evidence is undisputed that on the evening of February 5, 1960, Arnold Harrington, the insured, loaded a German Mauser automatic pistol with ten rounds of ammunition, placed the gun to his head and pulled the trigger. The question to be decided is whether the death of Mr. Harrington was accidental. Over the repeated objections of appellant, appellee was permitted to introduce a series of hearsay declarations intended to show that the insured relied upon the safety mechanism of the gun and that the discharge of the gun was, therefore, unintended. These statements were inadmissible and their admission was error. Moreover, under all of the evidence, admissible and otherwise, defendant was entitled to judgment as a matter of law. For it is apparent that whatever his hope or expectation concerning

the condition of the gun Mr. Harrington voluntarily and needlessly performed an act so dangerous to human life that death followed as a foreseeable consequence. In these circumstances, it is settled that death was not accidental and that appellant was and is entitled to judgment.

ARGUMENT

1. The Findings, the Conclusions and the Judgment Are Based Upon Inadmissible Evidence.

Over appellant's earnest and repeated objections, the District Court permitted the following evidence to go into the record:

(i) The testimony of appellee that prior to firing the fatal shot, the insured told her not to worry because the safety of the Mauser was on safe and that he would "prove" it to her (R. 95, 115-116); and that he tried to show her that the safety was on safe (R. 94);

(ii) The testimony of appellee that immediately after his injury, the insured looked at her with "great surprise" upon his face, and threw up his hands as he fell (R. 118); and

(iii) The testimony of Police Officer James F. Swinfard that upon his arrival at the scene and in response to his question as to what had happened, appellee told him that her husband had shot himself, but that he didn't mean it (R. 131, 135).

All of this evidence was plainly hearsay and much of it consisted solely of the opinions and conclusions of appellee. The evidence was inadmissible and its admission was error.*

*Appellee suggests that under Rule 43 (a) of the Federal Rules of Civil Procedure, doubtful evidence questions should be resolved in favor of admissibility (p. 15). The decisions cited to support this proposition do not so hold, nor, so far as appellant is able to determine, was the point considered in them.

First: It was error to admit into evidence the alleged statements of the insured prior to his injury to the effect that the safety of the gun was set on safe.

Appellant does not question the rule of *Whitlow v. Durst*, 20 C.2d 523, 127 P.2d 530 (1942), upon which appellee relies (p. 16), that when the intent of a declarant is a material element of a disputed fact, declarations indicating that intent may be admissible as exceptions to the hearsay rule. What matters here, however, is the qualification of that rule—that such declarations are admissible only where there is evidence that they are probably trustworthy and credible, and that they were made at a time when there was no motive to deceive. *People v. Hamilton*, 55 C.2d 881, 895, 362 P.2d 473 *Modified*, 56 A.C. 94, P.2d (1961). Appellee argues that, upon a review of what took place upon the evening of the fatal shooting, the circumstances are “drained of suspicion” of suicide (p. 17). But appellee ignores the fact that sometime during that evening Mr. Harrington, whose invariable practice it was to keep his guns unloaded in the home (Ex. 6, p. 3) loaded the Mauser automatic with ten rounds of live ammunition. This evidence alone almost compels the conclusion that he was at least considering suicide as a relief for his frustations. Why else would he have loaded the gun? It cannot, therefore, be said that plaintiff has established that the declarations which were made were probably trustworthy or that they were made at a time when there was no motive to deceive. Under the rule of *People v. Hamilton*, the admission of this evidence was error.

Second: It was error to admit the testimony of appellee that immediately after his injury the insured allegedly looked at her with “great surprise” upon his face.

It is settled that opinion evidence is admissible only when there is some basis in the experience of the witness for

forming the opinion stated. See *People v. McLean*, 56 A.C. 683, P.2d (1961); 32 C.J.S., Evidence, § 455, p. 94. That this is so seems to be conceded by appellee for she says that opinion evidence is admissible "if the subject is one on which the ordinary person has some knowledge and experience" (p. 18). Did appellee have any basis in experience for forming the opinion that the insured's expression was one of surprise? Mr. Harrington was in a state of extreme physical and emotional shock. A bullet had just passed through his brain. Neither appellee nor any witness could have known to what extent the trauma of the wound was responsible for his expression. How could the effect of the wound have been taken into account at all? It seems apparent that there could have been no basis in appellee's experience for the opinion expressed. Its admission was therefore error. Compare *People v. McLean*, 56 A.C. 683, P.2d (1961).

Third: It was error for the District Court to admit into evidence the testimony of Officer Swinfard that upon his arrival on the scene, Mrs. Harrington told him that her husband had just shot himself but that he did not mean it.

This evidence was hearsay and was far too remote to come within the spontaneous declaration exception to the hearsay rule.* Moreover, there can be no doubt that the evidence also constituted an inadmissible opinion and conclu-

*The authorities to the point are discussed in appellant's opening brief (pp. 16-17). It only remains here to comment upon one statement of fact made by appellee. Appellee says "it may reasonably be inferred from the evidence that this assertion was made within six minutes from the time Mrs. Harrington had seen her husband drop to the floor. . . ." (p. 19). In fact Mrs. Harrington testified that after the insured's injury she first gathered the children together and sent them into the bedroom (R. 120-21), then called the police (R. 120), and that Officer Swinfard arrived "ten minutes or so" after the call (R. 121). Thus, on appellee's own testimony, it was at least ten minutes before she made her statement to Officer Swinfard and possibly longer.

sion of the witness. Appellee does not contend, nor could it be contended, that such an opinion would have been admissible if offered by Mrs. Harrington at the trial. What appellee does say is that, for some reason which has not been explained, the rule prohibiting opinion evidence does not apply when the opinion forms part of an alleged spontaneous declaration. The authorities are to the contrary. See:

Anno., 163 A.L.R. 186:

“A general rule analogous to that which requires evidence of knowledge on the part of the speaker is that which forbids the use, to prove facts, of a *res gestae* utterance which expresses only a supposition, conclusion or opinion, as to those facts.

Boone v. Oakland Transit Co., 139 Cal. 490, 492-93, 73 Pac. 243, 244 (1903):

“There can be no question that the opinion of a witness who saw the accident, whether or not it was caused by the negligence of the defendant, would not be admissible, and would be injurious if allowed. With much more reason can it be said that hearsay statements as to the opinions of third persons, not placed upon the witness stand, and not subject to cross-examination, are both inadmissible and injurious, if directed to a material point in the case.”

Catlin v. Union Oil Co., 31 Cal. App. 597, 610, 161 Pac. 29, 35 (1916):

“It may be assumed that the statements made by the deceased were sufficiently contemporaneous with the occurrence as to admit them in proof as part of the *res gestae* [Citation], but it does seem quite clear that the particular sentences objected to could not have been competent in any case; they were not statements expressive of how the accident occurred, for the witness had already described what had happened, but

presented purely the opinion and conclusion of the deceased as to the fluid which he was using being gasoline.”

Appellee does not deny that the District Court relied heavily upon the foregoing inadmissible evidence in reaching its decision. Appellee does assert that the inadmissible evidence was “merely cumulative” of other evidence and that its admission was therefore only harmless error (pp. 20-21). On the contrary, without the inadmissible evidence it seems apparent that appellee could not have sustained her burden of showing that death did not result from suicide. Without that evidence the controlling facts would be these: the insured, angry at appellee, loaded the Mauser with ten rounds of ammunition, snapped the gun in an effort to get her attention, and when she continued to ignore him, put the gun to his head and pulled the trigger. Under such a state of facts, there would be no room for speculation as to what was intended. The inference of suicide would be inescapable.* See *Trivette v. New York Life Ins. Co.*, 283 F.2d 441 (C.A. 6, 1960), *cert. denied*, U.S. (Oct. 9, 1961).

2. On the Basis of the Undisputed Evidence Appellant Is Entitled to Judgment as a Matter of Law.

The evidence is undisputed that on the evening of February 5, 1960, Arnold Harrington loaded the Mauser automatic pistol with ten rounds of ammunition, and, knowing

**New York Life Ins. Co. v. Dick*, 359 U.S. 437, 79 S. Ct. 921 (1958) upon which appellee relies (p. 21) is not in point. In *Dick* there was no evidence as to how the gun was discharged. Here it is admitted that the insured put the gun to his head and pulled the trigger. In *Dick*, moreover, the burden under state law was upon the insurer to prove that death resulted from suicide. Under California law, which governs here, the burden is upon the beneficiary to establish that death did not result from suicide. See *Zuckerman v. Underwriters at Lloyd's*, 42 C.2d 460, 267 P.2d 777 (1954).

it to be loaded, put it to his head and pulled the trigger. In these circumstances, death was not accidental as a matter of law. The rule of the cases is this: when a man voluntarily and needlessly performs an act so dangerous to human life that death follows as a foreseeable consequence, death, when it occurs, is not accidental. The authorities to the point are cited and discussed on pages 20 through 24 of appellant's opening brief. Appellee has suggested a number of reasons why this rule of law should not be applied here. None of them are of substance.

Appellee says that the "voluntary" act of the insured in putting the gun to his head and pulling the trigger was not one from which death might foreseeably result, since the gun, had it been set on safe, could not have discharged (pp. 12-13). The answer, of course, is that the possibility that the safety might become dislodged or might not function was a risk any reasonable man would have foreseen. This was the risk the insured assumed when, after tampering with the hammer and safety, he voluntarily pointed the loaded gun to his head and pulled the trigger. It was the precise risk which resulted in his death.

Appellee deplores the "tortured reasoning" through which the courts have distinguished between policies insuring against accidental death and those insuring against death by accidental means, and then suggests that that distinction should be applied here to lessen appellee's burden of proof (pp. 22-23). The decisions, however, make no distinction between the two types of policies where, as here, the insured voluntarily embarks upon a hazardous course of conduct. In such a case, the risk which results in death is the risk which is apparent in the means producing death, and death, therefore, can be neither accidental nor produced by accidental means. See *Postler v. Travelers Ins. Co.*, 173 Cal. 1, 4, 158 Pac. 1022, 1023-24 (1916), over-

ruled on other grounds in *Zuckerman v. Underwriters at Lloyd's* 42 C.2d 460, 474, 267 P.2d 777, 785 (1954):

“[A]n effect which is the natural and probable consequence of an act or course of action is not an accident, nor is it produced by accidental means. It is either the result of actual design, or it falls under the maxim that every man must be held to intend the natural and probable consequence of the means which produced it....”

See also *Price v. Occidental Life Ins. Co.*, 169 Cal. 800, 147 Pac. 1175 (1915), *Thompson v. Prudential Ins. Co. of America*, 84 Ga. App. 214, 66 S.E. 2d 119 (Ga. App. 1951) and *Ford v. Standard Life Ins. Co.*, 12 CCH Life, Health and Accident Cases 789 (Tenn. App. 1947).

Appellee's principal argument is that this case does not fall within the rule of *Postler* and *Price* because of an alleged finding by the District Court that death did not follow as a foreseeable consequence of the conduct of the insured (pp. 12-13). Upon a fair reading of the record, however, it is most doubtful that any such finding was either made or intended. Certainly there is no evidence of such a finding in that part of the opinion where the court expressly sets forth its findings of fact (R. 19). Appellee quotes a portion of the court's opinion in support of her position (p. 13), but an examination of the entire opinion demonstrates that the portion quoted was not intended as a finding of fact, but rather as part of a legal discussion in which the court vacillated between the standards of the foreseeable and the foreseen (see, in particular, R. 30-32). This conclusion is strongly supported by what was said by the District Court during argument and after the close of the evidence: “He [the insured] either knew or should have known that he was doing a dangerous thing.” (R. 281). It cannot be assumed, in the absence of an express and

unequivocal finding, that the trial judge changed his views upon this question of fact after argument and prior to writing the opinion. Moreover, a finding that the insured could not reasonably have foreseen the mortal hazard he was creating could not, even if made, be sustained here; for it is clear as a matter of law that that hazard would have been obvious to anyone.

3. The District Court Erred in Applying the Substantive Law Relating to the Question of Accidental Death.

In reaching its decision the District Court failed to follow controlling decisions of the Supreme Court of California in the *Postler* and *Price* cases and erred in determining the hazardousness of the conduct of the insured by the subjective state of mind of the insured, rather than by the standard of reasonable foreseeability, as is the rule of the cases.

Appellee suggests that some of the California cases may be read to support the application of a subjective standard (p. 23), but the cases which are cited afford no such support. *Davilla v. Liberty Life Ins. Co.*, 114 Cal. App. 308, 299 Pac. 831 (1931) is in fact authority to the contrary, for the court said there:

“So in the instant case, it cannot be said as a matter of law that the insured intended, by swerving and applying his brakes, to skid his motorcycle and to be thrown therefrom, *nor that he should have foreseen or anticipated the results of his voluntary attempts to avoid the peril.* (114 Cal. App. at 316, 299 Pac. at 834) (Emphasis added.)

None of the remaining cases cited involved situations where a reasonable man in the position of the insured would have apprehended any mortal danger whatever. In none of them,

therefore, was there any occasion to determine whether such a danger should be viewed subjectively or objectively. But in the California cases in which the point was involved in the decision, the rule has been that the hazardousness of the conduct of the insured was to be judged by the objective standard of reasonable foreseeability. See the cases cited and discussed on page 29 of appellant's opening brief.

Alternatively, appellee argues that the District Court in fact applied the objective standard of foreseeability in determining the danger involved in Mr. Harrington's conduct (p. 13). This contention appears to be based primarily upon the assumption that the court found as a fact that death was not the foreseeable consequence of the conduct of the insured. It seems highly doubtful, however, that any such finding was made (see *supra*, pp. 8-9). Moreover, a fair reading of the District Court's opinion demonstrates that the court in fact decided the case upon the basis of the subjective state of mind of Mr. Harrington. In that portion of the court's opinion in which the findings of fact are expressly set forth, the court found that the fact that the safety was in the fire position at the time of firing was a condition unknown to and unexpected by the insured (R. 19), but there is no parallel finding that this was a condition which could not reasonably have been foreseen by the insured. If the court were indeed applying an objective standard, why does no such finding appear? Moreover, the court found that the insured thought that the gun could be safely pointed at his head in a loaded condition (R. 19), a finding which also seems concerned solely with a subjective standard. Appellee suggests that the latter finding was necessary to determine the issue of suicide (p. 12) but this can hardly be so in view of the express finding that "the deceased had no intention to take his own life." (R.

19). It therefore seems apparent that the court in fact applied the erroneous subjective standard of the state of mind of the insured.

But even if it could be assumed that the rule of law applied by the District Court was not made clear by the opinion, appellee could not benefit by that lack of clarity. For the parties and this Court are both entitled to findings so explicit that they fairly demonstrate the basis upon which the case was decided. This Court has so held on numerous occasions. See, *e.g.*, *National Lead Co. v. Western Lead Products Co.*, 291 F.2d 447, 451 (C.A. 9, 1961):

“It is the duty of the district court to find the facts. Rule 52(a), Federal Rules of Civil Procedure, 28 U.S.C.A. ‘The findings should be so explicit as to give the appellate court a clear understanding of the basis of the trial court’s decision, and to enable it to determine the ground on which the trial court reached that decision.’”

Where the trial court has applied an improper rule of law, see *Lindbar, Inc. v. St. Louis Fuel & Supply Co.*, 276 F.2d 882 (C.A. 6, 1960) or has not made clear the basis of its decision, see *National Lead Co. v. Western Lead Products Co.*, 291 F.2d 447 (C.A. 9, 1961), it is normally appropriate that the judgment be reversed and the case remanded. But that course need not be followed here, for it is clear as a matter of law that death followed as a foreseeable consequence of the conduct of the insured. The evidence is undisputed that after tampering with the hammer and safety mechanism of a fully loaded gun, the insured deliberately and voluntarily pointed the gun to his head and pulled the trigger. The hazard involved in this extraordinary course of conduct was clearly foreseeable. In the words of the District Court, “[h]e either knew or should have known that he was doing a dangerous thing.” (R. 281).

CONCLUSION

For the reasons here summarized and discussed more fully in appellant's opening brief, the judgment should be reversed and the case remanded with directions that judgment be entered for appellant.

Dated: November 17, 1961.

Respectfully submitted,

MORRIS M. DOYLE

RICHARD MURRAY

McCUTCHEEN, DOYLE, BROWN & ENERSEN

Attorneys for Appellant

No. 17398

**United States
Court of Appeals**
For the Ninth Circuit

NEW YORK LIFE INSURANCE COMPANY,
a Corporation,

Appellant,

vs.

JOYCE A. HARRINGTON,

Appellee.

Transcript of Record

**Appeal from the United States District Court for the
Northern District of California,
Southern Division.**

FILED

No. 17398

**United States
Court of Appeals
For the Ninth Circuit**

NEW YORK LIFE INSURANCE COMPANY,
a Corporation,

Appellant,

VS.

JOYCE A. HARRINGTON,

Appellee.

Transcript of Record

**Appeal from the United States District Court for the
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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APPEARANCES

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In the United States District Court for the Northern District of California, Southern Division

Civil No. 39371

JOYCE A. HARRINGTON,

Plaintiff,

vs.

NEW YORK LIFE INSURANCE COMPANY, a Corporation,

Defendant.

PETITION FOR REMOVAL OF
CIVIL ACTION

Petitioner respectfully shows:

1. Petitioner is the defendant in the civil action commenced on August 17, 1960, in the Superior Court of the State of California in and for the City and County of San Francisco, No. 502869, entitled Joyce A. Harrington, Plaintiff, vs. New York Life Insurance Company, a Corporation, Defendant.

2. Service of summons and complaint was made on defendant on August 19, 1960. Said complaint is the initial pleading setting forth the claim upon which the aforesaid action is based, and defendant first received a copy of said initial pleading in the aforesaid manner on August 19, 1960. The aforesaid summons and complaint, true copies of which are attached hereto and made a part hereof, constitute all of the process, pleadings, and orders served upon defendant in said action.

3. The plaintiff above named was at the time of the commencement of the said action, and still is, a resident and citizen of the State of California. The plaintiff was not at the time of the commencement of the said action and still is not a resident or citizen of the State of New York.

4. The defendant was at the time of the commencement of the said action and still is a corporation duly organized and existing under the laws of the State of New York. Defendant had at the time of the commencement of the said action, and still has its principal place of business in the State of New York. Defendant was not at the time of the commencement of the said action and is not now a citizen of the State of California.

5. The said action is a civil action over which this Court has original jurisdiction under 28 U.S.C. § 1332 and is one which defendant is entitled to remove to this Court pursuant to 28 U.S.C. § 1441(a), in that the matter in controversy exceeds the sum or value of \$10,000.00 exclusive of interest and costs and is between citizens of different states.

6. The defendant accompanies this petition with a bond with good and sufficient surety conditioned that the defendant will pay all costs and disbursements incurred by reason of these removal proceedings should it be determined that this case was not removable or was improperly removed.

Wherefore, defendant prays that this Court accept this petition and bond, that the above action now pending against defendant in the Superior Court of the State of California in and for the City and County

of San Francisco, No. 502869, be hereby removed from said State Court to this Court, and that this Court proceed with the said action in accordance with law.

Dated: August 29, 1960.

/s/ MORRIS M. DOYLE,

/s/ RICHARD MURRAY,

McCUTCHEN, DOYLE,

BROWN & ENERSEN,

Attorneys for Defendant, New York Life Insurance Company.

Duly Verified.

In the Superior Court of the State of California
in and for the City and County of San Francisco

No. 502869

JOYCE A. HARRINGTON,

Plaintiff,

vs.

NEW YORK LIFE INSURANCE COMPANY, a
Corporation,

Defendant.

COMPLAINT FOR DAMAGES
(Breach of Insurance Contract)

Plaintiff alleges:

I.

At all times herein mentioned defendant New York Life Insurance Company, a Corporation, was,

and now is, a corporation duly organized and existing under and by virtue of the laws of a State unknown to plaintiff and, pursuant to authorization, transacting business in the State of California.

II.

Plaintiff is the widow of Arnold Harrington and is the named beneficiary of the benefits payable by the terms of the life insurance policies hereinafter referred to.

III.

Arnold Harrington died on February 5, 1960. At said time there were in full force and effect two policies of life insurance theretofore issued by defendant to said Arnold Harrington numbered, respectively, 25452964 and 26027201. The face value of policy 25452964 was \$10,000.00. The face value of policy 26027201 was \$5,000.00. Each of said policies included a double indemnity term which provided, in part, as follows:

“Double Indemnity Benefit

“This Company will pay to the beneficiary, subject to the terms and conditions of this policy, an additional amount (The Double Indemnity Benefit) equal to the face amount of this policy upon receipt of due proof that the Insured’s death resulted directly, and independently of all other causes, from accidental bodily injury and that such death occurred within 90 days after such injury and before the earliest of the following:

“(1) expiration of the grace period following the due date of a premium in default;

“(2) the policy anniversary on which the insured’s age, nearest birthday, is 70;

“(3) maturity of this policy as an endowment or its surrender for cash value.”

IV.

The death of Arnold Harrington resulted directly, and independently of all other causes, from accidental bodily injury and such death occurred within 90 days after such injury and before the happening of any of the contingencies referred to in the double indemnity term heretofore alleged.

V.

Thereafter plaintiff made proof to defendant of the death of Arnold Harrington and that said death occurred as hereinabove alleged but said defendant has at all times refused, and now refuses, to pay any sum upon either policy save and except for the single benefit payable under each, to wit, \$10,000.00 on policy 25452964 and \$5,000.00 on policy 26027201.

Wherefore, plaintiff prays judgment against defendant as follows:

1. For damages in the sum of \$15,000.
2. For her costs of suit.
3. For other and further appropriate relief.

Dated: August 16, 1960.

ALLAN BROTSKY,
CHARLES W. DECKER,

By CHARLES W. DECKER,
Attorneys for Plaintiff.

Duly Verified.

[Endorsed]: Filed August 17, 1960, Superior Court.

Received August 25, 1960.

[Title of Superior Court and Cause.]

SUMMONS
(General)

The People of the State of California,

To the above-named Defendant(s):

You are hereby directed to appear and answer the complaint of the above-named plaintiff(s) filed in the above-entitled court in the above-entitled action brought against you in said court, within Ten days after the service on you of this summons, if served within the above-named county, or within Thirty days if served elsewhere.

You are hereby notified that unless you so appear and answer, said plaintiff(s) will take judgment for any money or damages demanded in the com-

plaint as arising upon contract, or will apply to the court for any other relief demanded in the complaint.

Dated: Aug. 17, 1960.

[Seal] MARTIN MONGAN,
 Clerk.

By D. E. DUNN,
 Deputy Clerk.

Received August 25, 1960.

[Endorsed]: Filed August 29, 1960.

[Title of District Court and Cause.]

ANSWER OF DEFENDANT NEW YORK LIFE
INSURANCE COMPANY

Comes now the defendant New York Life Insurance Company and for its answer to the complaint admits, denies and alleges:

First Defense

1. Answering the allegations of paragraph I of the complaint, defendant admits and alleges that it is now and was at all times mentioned in the complaint a corporation duly organized and existing under the laws of the state of New York, having its principal place of business in the state of New York, and pursuant to authority, transacting business in the state of California.

2. Answering the allegations of paragraph II of the complaint, defendant admits that plaintiff is the widow of Arnold Harrington and named as beneficiary of the policies of life insurance referred to in paragraph III of the complaint. Defendant denies that any further benefits are payable by the terms of said policies.

3. Answering the allegations of paragraph III of the complaint, defendant admits that Arnold Harrington died on or about February 5, 1960; that at said time there were in full force and effect two policies of life insurance theretofore issued by defendant to said Arnold Harrington numbered, respectively, 25452964 and 26027201; that the face amount of policy 25452964 was Ten Thousand Dollars (\$10,000.00) and that the face amount of policy 26027201 was Five Thousand Dollars (\$5,000.00). Defendant alleges that policy 25452964 included a double indemnity term which provided:

“Double Indemnity Benefit

“The Company will pay to the beneficiary, subject to the terms and conditions of this policy, an additional amount (the Double Indemnity Benefit) equal to the face amount of this policy upon receipt of due proof that the Insured’s death resulted directly, and independently of all other causes, from accidental bodily injury and that such death occurred within 90 days after such injury and before the earliest of the following:

“(1) expiration of the grace period following the due date of a premium in default;

“(2) the policy anniversary on which the Insured’s age, nearest birthday, is 70;

“(3) maturity of this policy as an endowment or its surrender for cash value.

“However, the Double Indemnity Benefit will not be payable if such death results from (a) suicide, whether sane or insane, or (b) war, declared or undeclared, or any act incident thereto, or (c) travel or flight in any kind of aircraft (including falling or otherwise descending from or with such aircraft in flight) while the insured is participating in aviation training in such aircraft, or is a pilot, officer or other member of the crew of such aircraft; nor will such benefit be payable if such death is caused or contributed to by bodily infirmity, or any illness or disease other than a bacterial infection occurring in consequence of an accidental injury on the exterior of the body.

“These Double Indemnity Benefit provisions will not apply to any insurance provided under the Non-Forfeiture provisions nor to any dividend additions which may be credited under this policy. These Double Indemnity Benefit provisions will not affect tabular cash values under this policy.

“Upon receipt by the Company within thirty-one days of any premium due date of the Owner’s written request accompanied by this policy for appropriate endorsement, these Double Indemnity Benefit provisions will be terminated as of such premium due date.

“Any premium due under this policy on or after the policy anniversary on which the Insured’s age, nearest birthday, is 70 or prior termination of these Double Indemnity Benefit provisions will be reduced by the amount included for these provisions.”

that policy 26027201 contained a double indemnity term which provided:

“Double Indemnity Benefit

“The Company will pay, subject to the terms and conditions of the policy, an additional amount (the Double Indemnity Benefit) equal to:

“(1) the death benefit provided under (a) on the first page of this policy upon receipt of due proof that the Insured’s death resulted directly, and independently of all other causes, from accidental bodily injury and that such death occurred within ninety days after such injury and before the policy anniversary on which the Insured’s age, nearest birthday, is 70;

“(2) the death benefit provided under (b) on the first page of this policy upon receipt of due proof that the death of the Insured’s wife resulted directly, and independently of all other causes, from accidental bodily injury and that such death occurred within ninety days after such injury and before the premium reduction date.

“However, no Double Indemnity Benefit will be payable on account of the death of any person which occurs after surrender of this policy for cash value or expiration of the grace period following the

due date of a premium in default or which results from (i) suicide, whether sane or insane, or (ii) war, declared or undeclared, or any act incident thereto, or (iii) travel or flight in any kind of aircraft (including falling or otherwise descending from or with such aircraft in flight) while such person is participating in aviation training in such aircraft, or is a pilot, officer or other member of the crew of such aircraft; nor will such benefit be payable on account of any death that is caused or contributed to by bodily infirmity, or any illness or disease other than a bacterial infection occurring in consequence of an accidental injury on the exterior of the body.

“Any Double Indemnity Benefit payable on account of the death of the Insured will be paid to the beneficiary for the death benefit provided under (a) on the first page of this policy, and any Double Indemnity Benefit payable on account of the death of the Insured’s wife will be paid to the beneficiary for the death benefit provided under (b) on the first page of this policy.

“These Double Indemnity Benefit provisions will not apply to any insurance provided under the Non-Forfeiture provisions nor to any dividend additions which may be credited under this policy. These Double Indemnity Benefit provisions will not affect tabular cash values under this policy.”

Defendant denies each of the remaining allegations of paragraph III.

4. Answering the allegations of paragraph IV of the complaint, defendant admits that the death

of Arnold Harrington occurred within 90 days after the injury which caused said death, and before the happening of any of the contingencies set forth on lines 9 through 13 of page two of the complaint. Defendant denies each of the remaining allegations of paragraph IV of the complaint.

5. Answering the allegations of paragraph V of the complaint, defendant admits and alleges that plaintiff submitted to defendant a form entitled "Proofs of Death—Claimant's Statement" in which plaintiff represented the cause of death of Arnold Harrington to have been "accidental shooting;" that defendant paid to plaintiff the single indemnity benefits of policies 25452964 and 26027201 in the sums of \$10,104.17 and \$5,033.66, respectively; that defendant has declined to pay double indemnity benefits under said policies for the reason and upon the grounds that the death of Arnold Harrington did not result directly and independently of all other causes from accidental bodily injury within the meaning of the double indemnity provisions of said policies. Defendant denies each of the remaining allegations of paragraph V.

Second Defense

6. The death of Arnold Harrington did not result directly and independently of all other causes from accidental bodily injury within the meaning of the double indemnity provisions of policies 25452964 and 26027201.

Wherefore, defendant prays that plaintiff take nothing against defendant and that defendant have its cost of suit and such other relief as to the Court may seem proper.

Dated: October 11, 1960.

/s/ MORRIS M. DOYLE,

/s/ RICHARD MURRAY,

McCUTCHEN, DOYLE,

BROWN & ENERSEN,

Attorneys for Defendant New York Life Insurance Company.

Certificate of Service by Mail attached.

[Endorsed]: Filed October 11, 1960.

[Title of District Court and Cause.]

MEMORANDUM FOR JUDGMENT

This is an action for double indemnity benefits in the amount of \$15,000 under two policies of insurance issued by the defendant, New York Life Insurance Company, to Arnold Harrington, the deceased, as insured. The single indemnity life insurance benefits under the policies have already been paid to Mr. Harrington's widow and the beneficiary, Joyce A. Harrington, the plaintiff in this action, and there is no dispute concerning those benefits.

Mr. Harrington was fatally injured by a self-inflicted gunshot wound on February 5, 1960, and died the same day. This action was commenced on August 17, 1960, by the filing of a complaint in the Superior Court of the State of California, in and for the City and County of San Francisco. On August 29, 1960, the action was removed to this Court by defendant, pursuant to the provisions of 28 U.S.C. § 1441(a). This Court has jurisdiction of the action under the provisions of 28 U.S.C. § 1332.

The sole issue in the case is whether the death of Arnold Harrington “resulted directly, and independently of all other causes, from accidental bodily injury * * *” within the meaning of the double indemnity provisions of the policies. The plaintiff submitted appropriate proof of death in which plaintiff represented the cause of death to be “accidental shooting.” In its answer defendant has declined to pay the double indemnity benefits. There is also lurking in the record under this defense (though not vigorously made) the suggestion by the defendant that the death was the result of suicide and therefore excluded under the double indemnity provisions of the policies. The parties agree that this case is controlled by the California law on the subject, since the contracts of insurance were issued in California, and the incident, which is the subject of this suit, occurred in California.

The facts, which are practically undisputed, are as follows:

Mr. Harrington, the insured, was a laboratory technician by occupation and was thirty-eight years old. He was married to the plaintiff herein, and as the issue of that marriage there were five children living in the home, the eldest being age eleven. He was happy in his occupation, which at the time of his death was bringing him an income from \$1,000 to \$1,200 per month. His financial condition was relatively good, in that other than secured obligations for payments on his home and automobile, and current living expenses, all of which were currently in good standing, he had no financial obligations. His health and the health of his family were good, with the exception that he had an ulcer which was in a controlled condition. His family relationship appeared to be a happy one. There is no history of suicidal threats or tendencies. He had a hobby of collecting guns. Mrs. Harrington was fearful of guns, and did not participate in her husband's hobby. At the time of his death he was the owner of a number of rifles and hand guns of various types, among them the German Mauser semi-automatic pistol with which he fired the fatal shot. Mr. Harrington fired his guns frequently at a firing range, was quite familiar with them, was an expert shot, and prided himself upon his knowledge of guns. On the day of his death Mr. Harrington had been home from work with an adverse reaction to a flu shot, and he had a minor quarrel with his wife concerning her overstaying a visit with a girl friend. Mr. Harrington had been drinking, but did not appear to be intoxicated. The quarrel continued and

Mr. Harrington left the house in anger, returning approximately an hour later. Upon his return Mrs. Harrington refused to make up with her husband or to reply to him. At that time present in the room was the oldest child, a son aged eleven. Mr. Harrington, saying words to the effect that he might as well do something he enjoyed, started handling the Mauser semi-automatic pistol. The pistol was loaded with one shell in the barrel, or firing chamber, and eight or nine shells in the magazine. He was causing the gun to make a clicking noise. According to the evidence this could have been done in one of three ways, all of which involved causing the hammer to be released from a cocked or semi-cocked position to firing position, while the safety lever was on safe. The safety mechanism on the gun was so designed that even though the hammer dropped toward the firing pin it would not strike the firing pin while the safety lever was in the safe position. After a number of clicks Mrs. Harrington requested him to stop, saying in substance "Please don't do that, you know it makes me nervous" or "you know it's dangerous," to which Mr. Harrington replied that the gun was safe, and "see, I'll show you." Whereupon he placed the gun to his head and the gun fired, causing the gun shot wound through his head which caused his death shortly thereafter.

There was expert testimony concerning the condition of the gun and the operation of its mechanism. The significant factors are that there was little, if any, probability that the gun would fire when the

safety lever was in the position of safe, one witness saying the chances were a million to one, and that this was so regardless of how the hammer was released; that the only way the gun could be fired was when the safety lever was in a fire position; that as a matter of general safety practice with respect to firearms it was "dangerous" to point a firearm loaded, or unloaded, with the safety on, or off, at any vital part of the body. Under these circumstances the Court finds:

(1) That the death was produced by a gun shot wound, which was caused by the voluntary act of the deceased;

(2) That deceased knew the gun was loaded, but he thought the safety lever was in a safe position and that the gun would not fire in that condition, and, further, that the gun could be pointed at his head safely in the condition;

(3) That at the time of the firing the safety lever of the gun was in the fire position, but that this condition was unknown to and unexpected by the deceased; and

(4) That the deceased had no intention to take his own life.

Under these facts plaintiff contends that death occurred from "accidental bodily injury," and defendant contends that as a matter of law death could not have so occurred because the act of pointing a loaded gun at his head by the deceased was either

suicidal or so inherently dangerous that death followed as a foreseeable consequence.

While defendant suggests that the conduct of the deceased might have been suicidal, the main thrust of its argument is based upon the proposition that the death was non-accidental because of the performance of a dangerous act from which death was a foreseeable consequence. Defendant's reluctance to strongly urge that the death was the result of a suicidal act is confirmed by the evidence. Other than the minor family quarrel which occurred on the day of the shooting, there was no factor in Mr. Harrington's life which either directly or indirectly supports the inference that he intended to take his own life at the time of the shooting, or at any other time. Such factors as his condition of health, his financial status, his family status, and his mental condition, are all negative on the question of suicidal intent. The act of pointing a loaded gun, which he thought was safe, at his head, which might be characterized as foolish or dangerous, under the circumstances in which it occurred in this case is not suicidal. Plaintiff, therefore, has carried the burden that the death was not the result of suicide.¹

¹In its brief defendant asserts that the burden of showing that death was not the result of suicide was on the plaintiff, citing *Zuckerman vs. Underwriters at Lloyd's*, 42 C. 2d 460 (1954). If defendant's assertion is the holding of the *Zuckerman* case plaintiff here has met that burden. It is unnecessary for this Court to determine whether or not the *Zuckerman* case so holds.

See: *Wilkinson vs. Standard Acc. Ins. Co.*, 180 C. 252; *Canada Life Assurance Co. vs. Houston*, Cir. 9, 1957, 241 F. 2d 523.

The other portion of the defendant's contention raises a more difficult question, namely, whether under the circumstances of this case the non-suicidal death was caused by accidental bodily injury. In this situation it is the duty of this Court to determine what the courts of last resort of the State of California would hold under the facts of this case. In *Young vs. Aeroil Products Co.*, Cir. 9, 1957, 248 F. 2d 185, the court said at page 188:

“Preliminarily, it should be noted that the law of California governs the substantive issues in this case. It was in that state that the machine was purchased and used and where the fatal accident occurred. It is our limited duty to discern the substantive law of California on the issues in controversy and to apply it accordingly. Our task is not to innovate, but to imitate. Where the course of the law remains uncharted, as is the situation with several of the issues in the instant case, it is the duty of the Federal court to examine germane precedents and analogous decisions in California and to endeavor to ascertain from those decisions how the California courts would decide the case at bar. In the absence of direct authority, we must heed such guideposts as the state courts have constructed, for even here true allegiance to principle of *Erie Railroad Co. vs. Tompkins*, 304 U.S. 64, 58 S.Ct. 817,

82 L. Ed. 1188 precludes unrestrained and independent determination in a diversity case.”

There are a number of California cases dealing with the interpretation of insurance policies which provide for death payments as the result of accidental deaths. Careful research by counsel and by the Court fails to disclose any California case which closely resembles this case on its facts and it would be difficult to say with certainty what the California courts would hold under these circumstances. The California cases seem to make a distinction between insurance policies which insure against accidental death, and a death caused by accidental means, holding that those policies which insure against death from accidental means require proof not only “that death or injury should be unexpected or unforeseen, but there must be some element of unexpectedness in the preceding act or occurrence which leads to injury or death.” *Rock vs. Travelers’ Ins. Co.*, 172 C. 462.

There is a suggestion in later California cases that this distinction no longer is valid. *Cox vs. Prudential Ins. Co.*, 172 C.A. 2d 629, 637. See also: *Zuckerman vs. Underwriters at Lloyd’s*, 42 C. 2d 460, 473. In any event the distinction is of no moment in this case, because the policy in this case insured against death from accidental bodily injury, and would fall in the “accidental results” type of case as distinguished from the “accidental means” type of case, the latter requiring a greater quantum of proof. It is the conclusion of this Court that the

proof in this case is sufficient to establish that death resulted from accidental bodily injury under either standard.

This conclusion is based upon the definition of "accidental" as that term is used in accident insurance policies. The earliest California case dealing with the definition of this word in the context of insurance cases is *Richards vs. Travelers Ins. Co.*, 89 C. 170, where the court said:

"It is impossible to give a precise definition of the word 'accidental.' As every effect has a cause, there is one sense in which nothing is accidental.

"Accident policies are of recent origin, and there have been only a few judicial decisions with respect to them. But the authorities to be found on the subject seem to be to the point that 'accident' must be given its popular meaning; that is, a casualty—something out of the usual course of events, and which happens suddenly and unexpectedly, and without any design on the part of the person injured. The fullest discussion of the subject is to be found in the opinion of the United States circuit court for the district of Michigan, in the case of *Ripley vs. Railway Company*, 2 Bigelow's Life & Acc. Ins. Cas. 738. In that case the insured had been attacked by highwaymen, and killed, and it was contended that as the highwaymen intended violence, there was no accident. The learned judge (Withey, J.), in delivering the opinion of the court, says: 'Perhaps, in a strict sense, any event which is brought about by design of any person is not an

accident, because that which has accomplished the intention and design, and is expected, is a foreseen and foreknown result, and therefore not strictly accident. Yet I am persuaded this contract should not be interpreted so as thus to limit its meaning; for the event took place unexpectedly, and without design on Ripley's part. It was to him a casualty, and in the more popular and common acceptation, "accident," if not in its precise meaning, includes any event which takes place without the foresight or expectation of the person acted upon or affected by the event * * * I think, in construing a policy of insurance against accident, issued to all sorts of people, a majority of whom do not, as the company well knew, nicely weigh the meaning of words and terms used in it, courts are called upon to interpret the contract as a large class not versed in lexicology are sure to regard its terms and scope. That which occurs to them unexpectedly is by them called accident. The company fix the terms of the contract, and are to be held, in the absence of plain unequivocal exceptions and provisions, to intend what, in popular acceptation, the insured party is likely to understand by its terms.' In that case judgment went for defendant upon another point, and was affirmed by the United States supreme court, where the meaning of 'accident' was not discussed (16 Wall. 336); but the language of Judge Withey seems to us to express correct views of the question." (89 C. 175-176.)

This definition, "a casualty—something out of the usual course of events, and which happens suddenly

and unexpectedly, and without any design on the part of the person insured," has been repeated often in the many California cases which have subsequently dealt with the problem. Some of these cases are *Price vs. Occidental Life Ins. Co.*, 169 C. 800, 802; *Rock vs. Traveler's Insurance Co.*, *supra*; *Rooney vs. Mutual Benefit H. & S. Ass'n.*, 74 C. A. 2d 885, 888; *Zuckerman vs. Underwriters at Lloyd's*, *supra*; and *Cox vs. Prudential Ins. Co.*, *supra*. The essence of defendant's position is that the deceased invited death by engaging in conduct so inherently dangerous that death was the foreseeable result. In support of its position defendant cites *Postler vs. Traveler's Ins. Co.*, 173 C. 1, overruled on other grounds in *Zuckerman*, *supra*, *Price vs. Occidental Life Ins. Co.*, *supra*, and *Eraldi vs. No. Am. Acc. Ins. Co.* (N.D. Cal. 1937), 20 F. Supp. 735. In all of these cases the deceased started an altercation, which resulted in the death of the deceased caused by a shot from a gun fired by the other person to the altercation. In each of these cases the court held that in a case where the deceased invited death from a deadly weapon in the hands of another person the killing was a natural and probable consequence of his own voluntary act, and not an accident. In *Postler*, *supra*, the court said:

"The appellant contends, and we think upon good ground, that under any reasonable view of the evidence, the injuries suffered by *Postler* were not produced by accidental means, but were the natural and probable consequence of his own voluntary acts.

In *Western Commercial Travelers' Assn. vs. Smith* (85 Fed. 401, 405, [40 L.R.A. 653, 29 C.C.A. 223]), the court said that 'an effect which is the natural and probable consequence of an act or course of action is not an accident, nor is it produced by accidental means. It is either the result of actual design, or it falls under the maxim that every man must be held to intend the natural and probable consequence of the means which produced it * * *' (See also, 4 Cooley's Briefs on Insurance, p. 356; *Fidelity etc., Co., vs. Stacey's Exrs.*, 143 Fed. 271, [6 Ann. Cas. 955, 5 L.R.A. (N.S.) 657, 74 C.C.A. 409]; *Price vs. Occidental Ins. Co.*, 169 Cal. 800, [147 Pac. 1175]; *Rock vs. Travelers' Ins. Co.*, 172 Cal. 462 [156 Pac. 1029]; *Hutton vs. State Accident Co.*, 267 Ill. 267 [Ann. Cas. 1916C, 577, L.R.A. 1915E, 127, 108 N.E. 296]; *Prudential Casualty Co. vs. Curry*, 10 Ala. App. 642 [65 South. 852].) In *Price vs. Occidental Life Ins. Co.*, we had occasion to deal with a situation somewhat similar to the one before us. The insured had been killed by the discharge of a revolver held in the hands of another person. It was held that 'if it should appear that the killing had been the result of an encounter with deadly weapons, and that the deceased had himself invited and brought on such conflict, the fatal result would not have been accidental so far as he was concerned.' The decision of the United States circuit court of appeals in *Taliaferro vs. Travelers' Protective Assn. of America* (80 Fed. 368, [25 C.C.A. 494]), was cited with approval. There the court upheld a directed verdict in favor of the in-

surance company, it appearing that the insured had invited another to a deadly encounter which had resulted in his killing. Under the undisputed facts, we do not see how the case at bar can be taken out of the principle of those just referred to. Postler, after arming himself and declaring his intention of getting back his money, had gone to the gambling-house and had there undertaken to compel the payment of one thousand dollars at the point of a pistol. While he was engaged in this effort, an encounter took place between him and one of the men who was in the place when he arrived. In the course of this encounter he was killed.

“A man who attempts to obtain money from others by the display of a deadly weapon, aiding such display by threats of killing, must contemplate, as the natural and probable consequence of his actions, that there will be resistance to or interference with the consummation of his plan, and that such resistance or interference will be likely to result in armed conflict and serious injury to one or more of the participants. To all intents and purposes, Postler’s position, so far as concerns the probable consequences of his acts, was that of any man who attempts robbery at the point of a firearm. If such a man were killed by his intended victim, it could hardly be claimed that his death was caused by ‘accidental means,’ in the sense in which those words are used in policies like the ones before us. We are not suggesting that, from an ethical standpoint, Postler’s action was to be judged by the

standards which would be applied to the commission of an ordinary robbery. The conditions under which he had lost his money in gambling may have been such as to make him feel, whether rightly or wrongly, that he was justified in resorting to extreme and lawless measures in the effort to recoup his losses. But these considerations do not affect the ultimate question, which is whether the killing was the natural and probable consequence of his own voluntary acts. Under the authorities above cited, this question must be answered in the affirmative.” (173 C. 4-5.)

Plaintiff’s position is that death in this case was accidental because it was the unexpected and unforeseeable result of a voluntary act, and plaintiff urges that, although the deceased’s voluntary act of pointing a loaded gun at his head was both dangerous and unnecessary, death was the result of the deceased’s mistaken belief that the safety lever of the gun was in a safe position, and that, therefore, the gun would not fire.

In support of her position plaintiff cites a number of cases, among which are *Cox vs. Prudential Ins. Co.*, *supra*, and *Rooney vs. Mutual Benefit H. & S. Ass’n*, *supra*. In both of these cases the deceased had placed himself in a position of peril by a voluntary act of his own. In *Cox*, *supra*, the deceased had deliberately and voluntarily jumped out of a moving vehicle in which he was being transported as a prisoner by law enforcement officers, and was killed by a following vehicle. In *Rooney*, *supra*, the

deceased started a fist fight, and was knocked to the ground and killed by striking his head against the sidewalk. Both of these cases are subsequent in time to the California cases cited by the defendant. Both quote from the case of *Losleben vs. Cal. State L. Ins. Co.*, 133 C.A. 550, 556, with approval:

“While an injury to an insured person may result in greater or less degree from an original voluntary act upon his part, if there is some evidence which justifies the inference that the means which produced the injury contained something of an unexpected or unforeseen character involving other acts not intentionally done, the resulting injury may be said to be caused through accidental means.” (133 C.A. 556.)

In *Rooney*, *supra*, it is said:

“The rule in California is that each case must stand upon its own facts and that the legal principles enunciated as to what constitutes ‘accidental means’ as distinguished from ‘accidental result’ must be applied to such facts as appear in the particular case. These principles, applied to the facts of this case, do not support appellant’s claim that when one invites a fistic encounter and sustains injury or death therefrom recovery cannot in any case be had upon policies of the character here involved. To prevent a recovery upon such a policy, it must be made to appear that in utilizing the means to which he resorted the insured knew or should have known that he would probably sustain the in-

jury which resulted as a consequence thereof." (74 C. A. 2d 890.)

These more recent California cases seem to teach that, even though death may be the result of a voluntary act of the deceased in which the deceased started in motion a perilous course of conduct, death may be accidental where there is some act or occurrence in the course of conduct which is unanticipated and unexpected by the deceased, and from which it cannot be said reasonably that death was the natural or probable consequences of such conduct. The cases are not clear on where reasonable foreseeability ends and the unexpected begins, but seem to leave that question to the facts of each case.

Here the facts would seem to support the conclusion of accidental death rather than death as the foreseeable result of a dangerous or perilous course of conduct. It does not require expert opinion to establish that it is dangerous or perilous to point a loaded gun at one's head in the parlance of general safety practices in the handling of firearms. However, this does not mean that every death which results from the performance of such conduct is not an accident. If, as expert testimony showed here, the gun had a safety mechanism which reasonably could be anticipated to prevent firing, and consequently death, when properly used, then it cannot be said that death was the foreseeable result of pointing the loaded gun if the one pointing the gun thought, and had good reason to believe, that the gun was in that condition. The conduct of the deceased here could be called foolish, stupid, danger-

ous, perilous, unnecessary and many other characterizations of a similar import, but in the context of the surrounding circumstances it would require a strained appraisal of the facts to say that what occurred was not unexpected and unforeseen by him. Before he pointed the gun at his head he had been doing the same unsafe, mechanical manipulation with the gun by causing the hammer to be released toward the firing pin with the safety lever in a safe position without firing the gun. His announced purpose for putting the gun to his head was to demonstrate the safety of the gun in that condition. It was his mistaken belief that the gun was safe which produced the unexpected occurrence. It can be argued with some degree of plausibility that the deceased should have foreseen what probably happened here, namely, that somehow, in the manipulation of the gun he inadvertently moved the safety lever from a safe position to a fire position just before putting the gun to his head. In other words, should he have anticipated the mistake which caused his death? The answer is that in the common understanding an occurrence which happens as the result of a mistake is usually an accident. When weighing probabilities in this area the courts seem to require some element of certainty of the end result by the means used, without the intervention of some act or occurrence of an unexpected nature, such as a mistake, before holding that death is a foreseeable consequence. Here the end result of death would not have occurred but for the mistaken and unexpected condition of the gun. The Court, therefore, concludes

that death in this case resulted directly from accidental bodily injury.

Defendant has cited a number of cases from jurisdictions other than California which are not supported by the weight of authority in California, or are distinguishable on their facts. These cases are *Kinavey vs. Prudential Ins. Co. of Am.*, Pa. 1942, 27 Atl. 2d 286 (doing acrobatic stunts on the rail of a bridge while intoxicated); *Allred vs. Prudential Ins. Co. of Am.*, N.C. 1957, 100 S.E. 2d 226 (a fourteen year old boy killed as the result of laying down in the middle of a highway to show how brave he was); *Ford vs. Standard Life Ins., Co.*, Tenn. 1947, 12 C.C.H. Life, Health and Accident Cases 789 (handling a venomous snake under the religious belief he could handle such snakes without harm); *Thompson vs. Prudential Ins. Co. of Am.*, Ga. App. 1951, 66 S.E. 2d 119 (playing a form of "Russian roulette"); and *Baker vs. National Life & Acc. Ins. Co.*, Tenn. 1956, 298 S.W. 2d 715 (permitting a person to shoot at a can on the insured's head). There should be added to the cited cases *Trivette vs. New York Life Ins. Co.*, Cir. 6, 1960, 283 F. 2d 441 (shooting self with pistol). What was said in *Cox*, *supra*, seems apropos here:

"Appellant cites several other cases in support of its contention that the death was not caused by accidental means. Those cases are factually distinguishable from the present case. It may be stated generally that in those cases the death was the direct result of the voluntary act of the insured

(such as jumping from a high building or the top of a moving train) and no act of an intervening agency was involved; or that the death resulted from performing a daredevil stunt (such as handling a rattle snake, playing Russian Roulette, or permitting a person to shoot at a can on the insured's head); or that the death resulted from fighting with guns." (172 C.A. 2d 638.)

There are outside cases which seem to support plaintiff. See: *Aetna Life Ins. Co. vs. Kent*, Cir. 6, 1934, 83 F. 2d 685; and *Peppers vs. Sovereign Camp, W.O.W., Ga.* App. 1936, 187 S.E. 215.

During the course of trial defendant objected to and moved to strike certain pre-death conversations by deceased and statements by plaintiff made shortly after the occurrence. The Court admitted the evidence and reserved ruling on the objections and motions to strike. The objections are overruled, and the motions denied. At the conclusion of the plaintiff's case defendant moved to dismiss on the ground that the evidence, as a matter of law, did not establish that death occurred from accidental bodily injury within the meaning of the two insurance policies in question. Ruling was reserved. The motion to dismiss is denied.

Prior to the taking of evidence plaintiff requested the right to amend the pleadings to conform to proof on the question of interest. Plaintiff should forthwith present her proposed amendment, so that final judgment can be prepared and entered after the question of interest is determined.

Judgment is awarded plaintiff in the amount claimed, subject to the determination of the question of interest. Under the provisions of Rule 52(a) F.R.C.P. the findings and conclusions in this memorandum shall constitute the findings of fact and conclusions of law of the Court, except on the issue of interest, and counsel for plaintiff is directed to prepare and present a judgment in accordance herewith after the determination of the question of interest.

Dated: March 31, 1961.

/s/ OLIVER J. CARTER,

United States District Judge.

[Endorsed]: Filed March 31, 1960.

[Title of District Court and Cause.]

AMENDMENT OF COMPLAINT TO CONFORM TO EVIDENCE ON ISSUE OF INTEREST

Plaintiff herewith amends her complaint to conform to the evidence adduced at the trial of the above cause by adding thereto the following paragraph VI and altering the prayer as indicated below.

VI.

That plaintiff forwarded to defendant a form entitled "Proof of Death-Claimant's Statement" in which plaintiff informed defendant that the cause of the death of Arnold Harrington was accidental shooting; that defendant received said Proof of

Death on February 16, 1960; that thereafter on May 3, 1960, defendant addressed the following letter to plaintiff:

“May 3, 1960.

“Mrs. Joyce A. Harrington,
“716 Spruce Avenue,
“South San Francisco, California.

“Dear Mrs. Harrington:

“Policies 25 452 964
26 027 201

“Arnold L. Harrington, DB923 156

“With respect to your claim for Double Indemnity Benefits under policies 25 452 964 and 26 027 201, the Company has made a careful investigation as to all the circumstances surrounding your husband’s unfortunate death. As a result, we must take the position that since he voluntarily engaged in an act so inherently dangerous that his death could be readily foreseen and expected as a natural consequence, it did not result from accidental bodily injury within the meaning of the Double Indemnity Provisions of these policies.

“The Company, therefore, denies any liability beyond the single indemnity amounts already paid to you under policies 25 452 964 and 26 027 201.

“Sincerely yours,

“/s/ ALEXANDER F. CHAPPELL,
“Associate Claims Consultant.

“AFC:cg”

that at no time following receipt of said Proof of Death did defendant request plaintiff to provide further or more detailed information of the circumstances surrounding the death of Arnold Harrington.

Wherefore, plaintiff prays judgment against defendant as follows:

1. For damages in the sum of \$15,000.00, together with interest thereon at the rate of seven per cent per annum from February 16, 1961.
2. For her costs of suit.
3. For other and further appropriate relief.

Dated: April 6, 1961.

ALLAN BROTSKY,

CHARLES W. DECKER,

By /s/ CHARLES W. DECKER,

Attorneys for Plaintiff.

Duly Verified.

[Endorsed]: Filed April 14, 1961.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSION OF LAW ON ISSUE OF INTEREST

The above-entitled cause having heretofore been submitted for decision, and the Court having set

forth its findings of fact and conclusions of law in its Memorandum for Judgment previously filed herein but having expressly withheld its findings of fact and conclusion of law on the issue of interest, and the plaintiff having thereafter, with leave of Court, amended her complaint to conform to the evidence on this issue, the Court now makes its findings of fact and conclusion of law on this issue as follows:

Findings of Fact

That on February 16, 1960, defendant received from plaintiff proof that the death of Arnold Harrington resulted directly and independently of all other causes from accidental bodily injury in the form of a "Proof of Death-Claimant's Statement" in which the cause of said death was stated to be accidental shooting; that thereafter defendant conducted an investigation of the circumstances surrounding said death; that on May 3, 1960, defendant denied its liability to pay said double indemnity benefits to plaintiff because said death did not result from accidental bodily injury; that at no time following February 16, 1960, did defendant request plaintiff to furnish it further or more detailed information about the circumstances surrounding the death of Arnold Harrington; that the contracts of insurance sued upon provide for payment of said double indemnity benefits upon receipt of due proof that the insured's death resulted directly and independently of all other causes from accidental bodily injury.

Conclusion of Law

That plaintiff is entitled to interest at the rate of 7% per annum on the sum of \$15,000.00 from February 16, 1960, until paid.

Dated: April 14, 1961.

/s/ OLIVER J. CARTER,
Judge.

[Endorsed]: Filed April 14, 1961.

In the United States District Court for the North-
ern District of California, Southern Division

No. 39371

JOYCE A. HARRINGTON,

Plaintiff,

vs.

NEW YORK LIFE INSURANCE COMPANY, a
Corporation,

Defendant.

JUDGMENT

The above-entitled cause having come on regularly for trial on March 20, 1961, before the above-entitled court, Honorable Oliver J. Carter, Judge presiding, and the parties having each waived trial by jury, and said cause having proceeded to trial before the Court sitting without a jury, and the Court having heard the evidence adduced by both parties, and the argument of counsel, and the cause

having been submitted for decision, and the Court having heretofore filed herein its Memorandum for Judgment which said Memorandum constitutes the findings of fact and conclusions of law of the Court except on the issue of interest, and the Court having thereafter made and filed herein its finding of fact and conclusion of law on that issue——

It Is Hereby Adjudged:

1. That plaintiff recover from defendant the sum of \$15,000.00 together with interest thereon at the rate of seven per cent per annum from February 16, 1960 until paid.

2. That plaintiff recover from defendant her costs of suit.

Dated: April 20, 1961.

/s/ OLIVER J. CARTER,
Judge.

Approved as to Form.

MORRIS M. DOYLE,
RICHARD MURRAY,
McCUTCHEN, DOYLE,
BROWN & ENERSEN,

Attorneys for Defendant, New York Life Insurance
Company,

By /s/ RICHARD MURRAY.

[Endorsed]: Filed April 20, 1961.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that New York Life Insurance Company, defendant above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on April 21, 1961.

Dated: April 28, 1961.

/s/ MORRIS M. DOYLE,

/s/ RICHARD MURRAY,

McCUTCHEN, DOYLE,

BROWN & ENERSEN,

Attorneys for Defendant, New York Life Insurance
Company.

[Endorsed]: Filed April 28, 1961.

In the United States District Court for the North-
ern District of California, Southern Division
No. 39372

JOYCE A. HARRINGTON,

Plaintiff,

vs.

NEW YORK LIFE INSURANCE CO.,

Defendant.

REPORTER'S TRANSCRIPT

Appearances:

For the Plaintiff:

CHARLES A. DECKER, ESQ.

For the Defendant:

MESSRS. McCUTCHEON, DOYLE,
BROWN & ENERSEN, by
MORRIS M. DOYLE, ESQ.,
RICHARD MURRAY, ESQ.

March 20, 1961—2:00 P.M.

The Clerk: No. 39371, Joyce A. Harrington v. New York Life Insurance Co., for court trial.

Mr. Decker: Ready for the plaintiff.

Mr. Murray: Ready.

The Court: Do you desire to make an opening statement, Mr. Decker?

Mr. Decker: Yes, sir.

The Court: All right, you may make it. And if you desire to make an opening statement, Mr. Murray, you may make it at the end of Mr. Decker's statement or you may reserve it until time for the defense case.

Mr. Murray: Thank you, your Honor.

Mr. Decker: May it please the Court, as indicated in the memoranda which have been submitted to the Court by counsel, this is an action by the beneficiary of two policies of life insurance which, as admitted in the pleadings, were in full force and effect at the time of the death of the insured.

The insured, Arnold Harrington, died on February 5, 1960. It is also conceded by the pleadings that the plaintiff in this action, Joyce A. Harrington, is Mr. Harrington's widow and the beneficiary under both of the policies.

The Court: Well, what was that? I want to follow that, now. [4*]

Mr. Decker: It is admitted in the pleadings, sir, that plaintiff in this case is the beneficiary under both the policies.

The Court: Well, it's one person, though?

Mr. Decker: That's right.

The Court: It is the widow, Joyce Harrington, who is the beneficiary?

Mr. Decker: That is right, sir.

Both of these contracts of insurance had provisions for double indemnity payment in the event that the death of the insured resulted directly and independently of all other causes from accidental bodily injury. And so the question before the Court as posed by the pleadings is, one, did Mr. Harrington's death result directly and independently of all other causes from accidental bodily injury, as that term is used in the contracts of insurance.

The Court: Does this go to only one feature of the policies, that is, the double indemnity side of it?

Mr. Decker: That is right, your Honor.

The Court: So far as the—what term do you use to describe the base sum, if I may use that term, of the policy? There is no dispute about that? It has been paid?

Mr. Decker: It has been paid, yes. No dispute about that at all.

As I have indicated in my trial memorandum, I think [5] and I submit, there is a subsidiary issue of fact in the case, and that is, did the defendant

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

insurance company receive due proof that the death resulted from accidental bodily injury and, if so, when. And, as I have indicated in my memorandum, the reason that I think that is an issue of fact is that under the case law in California, if the beneficiary did in fact submit such due proof, then she is entitled to interest on the amounts of the double indemnity at the rate of seven per cent per annum from the date the company received such proof.

The Court: Is this a contested issue?

Mr. Decker: It is contested at this point, your Honor, perhaps because the defendant has not really had an opportunity to plead to it, because in the complaint there is no specific request for interest. There is no prayer for interest.

The Court: Well, what do you want to do about it?

Mr. Decker: Well, as indicated in my memorandum, I have noted that in the complaint there is an allegation that due proof was made, and in the answer there is an admission that a form of proof was received, but there is no admission that due proof was received.

The Court: Yes, because the defendant denies liability, period.

Mr. Decker: Yes.

The Court: And whatever proof was filed [6] was insufficient to require that the double indemnity be paid.

Mr. Decker: That is correct, sir.

The Court: So that's the way the matter arises, by that denial, or is there an allegation that there

was not proper proof of loss or proof of death, if you may use that term—I don't know which is appropriate in this case—to require that any payment be made? I take it that that's not so because they paid off as to the base amount of the policies.

Mr. Decker: That's right, sir. I think it arises on the basis of the allegation in the complaint that due proof was made and the denial in the answer that due proof was made.

The Court: Well, is interest a matter that has to be specially pleaded?

Mr. Decker: I don't think so. I haven't researched this point, but——

The Court: Well, I am talking about the interest you are claiming. I am not talking about the interest after judgment, that flows from the judgment. I am talking about interest prior to judgment.

Mr. Decker: I understand that, and the only answer I can give you at this point on that, your Honor, is that there is a California case which is cited in my memorandum where interest was allowed, although not prayed for, by way of amendment of the judgment. [7]

The Court: Well, I assume you could amend your pleadings to conform to the proof if you wanted to wait until that time, or you could, under Rule 15, move to amend your pleadings right now.

Mr. Decker: I had contemplated amending to conform to proof.

The Court: Rule 15 has to be broadly interpreted. Having had one of my judgments reversed

for failure to do this one time, I am very conscious of this problem.

The only thing that occurs to me, Mr. Decker, is that, mentioning it now, are you under a duty to give notice as quickly as you can by filing your proposed amendment, so that the defendant's probability of being prejudiced would be lessened? I frankly don't know. I am merely raising the question and I will leave it to you. I know you could approach this problem by proposing to amend to conform to the proof or you could approach it by proposing to amend now.

Mr. Decker: I could propose to amend now if I had a written amendment ready to file with the Court, which I do not have.

The Court: Well, you proceed as you desire.

Mr. Decker: I have given notice to the defendant by providing him with a copy of the plaintiff's pretrial memorandum, which raises this point which I am discussing with the Court now. [8]

The Court: Yes.

Mr. Decker: In any case, I think that this is a subsidiary fact issue and will attempt to meet my burden as I go along on this question of fact.

Now, here, your Honor, is what I think the evidence will show, and I think that there is very little likelihood that there is going to be any serious conflict in the evidence as to matters of fact:

It will show that the plaintiff in this case, Joyce Harrington, was married to Mr. Harrington years ago, shortly after the conclusion of World War II, and after they had met in China. He at that time

was a member of the armed services and she was an employee of the same laboratory where he worked.

The Court: Is there going to be any argument about marriage?

Mr. Decker: None. This is purely by way of background.

The Court: Mr. Murray, is there any problem in this? Can we stipulate to that?

Mr. Murray: No, your Honor, we don't contest that.

The Court: You are just giving this for background?

Mr. Decker: That is right, your Honor.

The Court: All right. Go ahead. When you come to the place where issues will be contested, will you call it [9] to my attention?

Mr. Decker: Yes, your Honor.

The Court: You may give the background, certainly, on uncontested matters. I didn't mean to imply that.

Mr. Decker: All right.

The Court: I was maybe anticipating, and rather than do that I will let you call that to my attention.

Mr. Decker: All right, your Honor.

The Court: Proceed, Mr. Decker.

Mr. Decker: The marriage occurred there and they came to this country, and within a very short time they took up residence together here in San Francisco and lived here together until this tragedy

of February 5, 1960. There were five children born to this marriage, all of whom are alive today.

Mr. Harrington was a laboratory technician, and he initially, when he came into civilian employment, was employed by a physician out at Stonestown here in San Francisco and later became employed at St. Luke's Hospital, where he became the Chief Laboratory Technician and he was so employed at the time of his death.

In addition to his work as a laboratory technician, he had two hobbies, one of which was gun collecting. The other was radio equipment. He was a ham radio operator.

Over the course of the years he collected [10] several guns, and it was his custom and habit to occasionally inspect the guns and clean them. He was certainly thoroughly familiar with all of them. And also about once a week he would take his—along toward the last year or two, in any case—would take his oldest boy, Arnold, Jr., to the pistol range and they would fire the guns.

In view of the holding in the Zuckerman case, which indicated that part of the plaintiff's burden of proof in a case of this kind it is incumbent upon the plaintiff to, in effect, negative suicide, I would point out as a part of the preliminary statement in this case and a part of the proof which I intend to adduce, that the evidence will show that Mr. and Mrs. Harrington lived happily together; that both of them were in good health and the children were in good health; that there were no financial problems; that they had recently purchased the home

which they were residing in at the time this accident occurred, a very pleasant, comfortable, clean, well furnished home in South San Francisco; that Mr. Harrington had never threatened to take his own life; that he was not a despondent or difficult person.

But, nonetheless, on February 5th, 1960, the following transpired:

On that day Mr. Harrington had suffered a slight illness, apparently caused by reaction which he had to a flu shot, so although it was a workday he did not go to work that [11] day. Instead, in view of the fact that he was at home to look after the children if they needed caring for, Mrs. Harrington took the day off and she went to visit a friend of hers. The arrangement was that she was to call home and arrange for her husband to come and get her by 4:00 o'clock in the afternoon, or some time like that, but she overstayed her leave and didn't call him to come and get her until about 6:00 o'clock. He was understandably provoked and when he did come to get her he chided her about this, but they returned to their home on Spruce Street in South San Francisco.

At this time Mr. Harrington had already eaten, as had the children. He had fed them. So Mrs. Harrington took a meal herself, and some time thereafter Mr. Harrington left the house.

I should say that perhaps at this point on, your Honor, is where there may be some conflict in the evidence on matters of fact, although I don't think so.

Mr. Harrington returned to the house and came into the living room where he poured himself a drink, or had the older boy, Arnold, Jr., mix it for him—I am not sure exactly what the evidence will show on this—and he sat on the living room couch in the living room of the house and began to clean his most recently acquired gun, a German Mauser pistol. He had a piece of chamois cloth which he was using in cleaning this gun. He had asked his wife if she didn't want to make [12] up, and she was sitting at the other end of the couch and she was unwilling to talk to him or even look at him. So eventually he stood and walked over to a position directly in front of her where she was seated on the couch and near the end of the coffee table which sat in front of the couch.

At this point he had been for some time causing the gun to make a snapping noise, and he continued that while he was standing there in front of her. The evidence will show that at this point she said to him something like this, "Don't do that, Harry. You know it makes me nervous," and his reply was something to this effect, "There is nothing to make you nervous. There is nothing to be nervous about. It is perfectly safe." And with that he put the gun up to his temple and the gun discharged and he fell dead at her feet.

At the time this happened the oldest boy, Arnold, Jr., was seated within a matter of a few feet of Mrs. Harrington. He was doing his homework.

The Court: How old is the boy?

Mr. Decker: At that time he was eleven.

The Court: Is he going to be a witness in this case?

Mr. Decker: Yes, he will be.

The Court: What problems are we going to have of management insofar as this experience?

Mr. Decker: Well, his deposition has been taken. At the request of the defense, he was made available for a [13] deposition, and it was at this time that we faced this problem and it didn't turn out as badly as we thought it might, and the mother has given her permission to use him as a witness if I consider it will be of assistance to the Court.

The Court: Well, this is a difficult situation for all parties.

Mr. Decker: That's right.

The Court: The only thing I want to occur is to have the shock and the incidental aspects of this matter—or maybe I shouldn't say incidental. I mean the collateral aspects of it which may have some rather drastic effect—I want to have that cut to a minimum if I can.

Mr. Decker: Well, I think I am going to reserve my decision as to whether or not I call him as a witness. I will call him if I think it's indicated, and this will depend somewhat on how the trial goes.

The Court: The only reason I mentioned this is that I expect counsel to use good taste, both plaintiff and defendant. I think that I must take cognizance of the problem. It is going to be difficult enough, I imagine, for Mrs. Harrington to go through the testimony concerning the incidents, but I presume that, being an adult, she is more condi-

tioned to going through this. And if it cannot be helped as far as the Court is concerned, because it is part and parcel of the lawsuit itself, and she is seeking the relief of the [14] courts and therefore this is one of the things she must do.

But with a child who would be a witness, and who is not a beneficiary directly, and who has not sought the relief of the courts, I think that here my discretion is involved, and I am going to try to keep the problem, insofar as the child is concerned, to a minimum.

I don't mean to say that I am issuing any order or command that you don't do it. I just want you to use your best judgment for the purpose of protecting the child insofar as whatever traumatic result may come from having to be a witness in this kind of a lawsuit. And I will say to you, and Mr. Murray as well, that I want to try and keep the collateral results to a minimum, if I can. But I don't mean to imply that you shall not do one thing or another. I will just have to exercise my judgment as we go along. If I see the matter getting out of line, I am going to restrict the questioning in that area.

But I don't expect that I will have to do that because I am sure both of you gentlemen understand the problem as well as I, and I am sure that you are equally desirous of not causing any more difficulties in this area than is absolutely necessary in order to accomplish the over-all objective of getting the proper testimony before the Court.

Mr. Decker: Your Honor, I think I cannot only

speak for myself but also for Mr. Murray on this subject, and we [15] both are very much concerned about it, and we will make every effort to avoid causing the boy or anybody else any severe effects as a result of what we call upon them to do.

In any case, your Honor, following this incident, the evidence will show that Mrs. Harrington got the children all away from the scene and then, knowing what had happened, called the police, who reported quickly, and we will call officers to testify as to what they observed when they got there.

The evidence will further show that Mr. Harrington died at 11:55 p.m. that very evening at St. Luke's Hospital as a result of his gunshot wound.

That is all of my opening statement.

The Court: Do you desire at this time to make an opening statement, Mr. Murray?

Mr. Murray: Well, your Honor, I had originally intended to make an opening statement. However, since the case is being tried by the Court, I think Mr. Decker has stated the factual outline sufficiently to let the Court know where we are going, and I believe our legal position is perhaps clear in the memorandum which we filed.

The Court: Well, to put it rather loosely, but to get the fact issues that are before me narrowed down as much as I can, I would like to ask both you and Mr. Decker to indicate to me that the main issue, I take it, is whether or [16] not this was an accidental death as described by the policy or, to put it the other way, whether it was a death brought

on by the hand of the deceased, which would be, in the parlance of the streets, classified as suicide.

Mr. Murray: No, your Honor, I think the question is broader than that. Of course, if suicide were the cause of Mr. Harrington's death, that would be the end of the case.

The Court: Yes.

Mr. Murray: But we also think the law is when a man courts danger, so to speak, and voluntarily and needlessly performs an act which a prudent man would recognize as highly dangerous, then his death when it occurs is not accidental. We think this is the law, your Honor, and this is our primary position, and the cases we have cited in our brief bear out that position.

The Court: Then let's put it this way so I will understand it: Your contention will be that the plaintiff has the burden of proving that this death was an accidental death, as that term is used in the policy?

Mr. Murray: That's right.

The Court: And that the evidentiary showing here will not carry that burden, and that you don't affirmatively have to establish that this was a suicide. If it was, this would dispose of the matter, but it could be something less than a suicide but an act on the part of the deceased which would [17] not qualify as an accidental death under the policy.

Mr. Murray: That's right, your Honor.

The Court: I don't know whether it is the Zuckerman case you are talking about, although I don't know that that is so——

Mr. Murray (Interposing): No, your Honor; in this matter I am not——

The Court: No, I was talking to Mr. Decker. Mr. Decker mentioned the Zuckerman case. I just recollect having recently read of the case involving somewhat a similar factual situation. I don't know that it is a California case. I think it is a federal case that arises out of some District or Circuit Court that has come down within the last six months, at least, which has a somewhat substantially similar factual background, whether or not a self-inflicted wound by gunshot was accidental or was in the nature of a suicide, or one that wouldn't qualify as an accidental death.

Mr. Murray: Perhaps that's the Trivette case, your Honor?

The Court: Could be. I don't remember the name of it. I am going to have to go back and look through some of the cases. It could very well be. You may keep up on these much more closely than I do. All I remember is having read one which sounds something like this one, in which there was a verdict—I think there was a jury verdict in that case— [18] sustained. The holding was sustained that this was accidental. But it was a question of fact that had to be decided.

Now, I don't mean to say that that should determine the question of fact here, just merely sustaining one which came out of a similar background. I think it occurred in one of the other Circuits than the Ninth Circuit. But I will just have to go back and search the headnotes of the advance sheets

and see if I can discover the case. I merely mentioned that because if there are cases which shed any light on the problem I would like to have you familiar with them.

The other thing is, I take it this is a diversity of citizenship case and that I am applying the laws of the State of California in applying the contract.

Mr. Murray: It is a diversity case and I believe your Honor is correct.

Mr. Decker: That is my view, your Honor.

The Court: All right, then, the California cases which go to contract interpretation and the substantive law of the State of California on contract interpretation apply here, and we will have to determine what that is and attempt to apply it to the facts.

Are there any other procedural questions that should be called to my attention—or any procedural questions? I have one in mind that appears to be indicated about the admissibility of the testimony of the deceased. This, of course, [19] is always a question where the statements of the deceased person are involved, the basic rule being against statements of deceased persons unless there is some exception to the rule, because this could be a hearsay statement.

I notice that this has been raised in the trial memorandums. I presume you are prepared to present your arguments on that matter. I haven't had a chance to research it, and I don't know whether any of these—what should I say—similar type cases have discussed that evidentiary problem. I remem-

ber back to my law schools days that some of these statements that were made just prior to death—the one I remember is Delverno's stabbing (?), and that was admissible, I know, and just after he was stabbed, why——

Mr. Decker (Interposing): Well, of course, that is a dying declaration.

The Court: Yes, I understand that, and this is not a criminal case and therefore the dying declaration doesn't apply. But there are similar rules in the civil cases.

Mr. Decker: I take it, your Honor, that in view of the fact that we are trying the case before the Court, sitting without a jury, even these evidentiary problems shouldn't hold us up. I am prepared——

The Court (Interposing): No, Mr. Decker. The only thing I say is, if it is a matter of some moment in time—that is, you have to hear a lot of material and then discard [20] it—I would have to make a judgment as to whether I would have to hear the motion argued now and dispose of it or let it go ahead.

Now, I am well aware of the fact that you can hear the testimony subject to objection and motion to strike and then rule on it. I am not a strong advocate of straining out error after it is in the record. But you don't have the same problems that you would have before a jury. I recognize that. I certainly would try to get the question isolated so it can be viewed without prejudice. I simply will have to face that problem when I come to it.

I merely mention it because I take it that is going to be one of the problems. Now, are there others of

a similar nature so I can start my research on it right away?

Mr. Decker: None that I know of, your Honor.

The Court: Do you have any, Mr. Murray?

Mr. Murray: No, your Honor.

The Court: And is that one going to be—have I stated the question properly?

Mr. Murray: Well, your Honor, I think that the testimony is hearsay testimony and we will regard it as objectionable.

The Court: Well, you are going to stand on that point. I don't know what the answer to the question is. I do know there are exceptions to the rule, and if this testimony comes [21] within one of the exceptions to the rule, of course, it may be offered into evidence, and the federal rule favors admissibility under Rule 44—or maybe it is 43, too; also, Rule 43. Rules 43 and 44 are taken together. I know, and favor admissibility.

All I want to do is to get in my mind the questions and to be able to rule on them as promptly as I can. I hope I may be able to rule on it when we get there, but you gentlemen may get to it before I have a chance to research it.

Mr. Decker: I can state my position on it very quickly and give you the authorities that I rely on, Judge, when we get to it.

The Court: Well, I don't believe you have outlined that question in your trial memorandum.

Mr. Decker: No, your Honor, I didn't anticipate it.

The Court: Well, then, all right, we will meet

with that problem. As soon as you can give me the authorities—if you want to give them to me now so that my law clerk can take them down, why, I will start some checking into the matter.

Mr. Decker: All right, your Honor. My authorities are predicated upon what was said in the deposition by Mrs. Harrington as to what her husband said when this occurred.

The Court: Well, it is substantially as you have outlined it? [22]

Mr. Decker: Substantially as I have outlined it. Now, if that is the evidence, it is obvious the statement of her husband is not a statement which we are offering for the purpose of proving that the fact asserted is a fact. We are offering it only for the purpose of showing the state of mind of the deceased at that particular moment, and under those circumstances it's not hearsay at all because we are not concerned with the fact asserted in the statement, namely, that "the gun is safe." We are concerned in this case with this man's state of mind. Did he think the gun was safe or not? That's the issue.

The Court: Well, can that be proved by a hearsay statement?

Mr. Decker: If it is offered for the purpose of showing his state of mind, it can be, and the authorities are found in Witkin's Book on Evidence at Pages 242-243. And also you will want to look at the discussion in Witkin at Page 232 on this subject.

The Court: Is there not—I simply don't know

whether it is present or not, but is there going to be any argument that this would be a part of the *res gestae* type of exception?

Mr. Decker: That's the so-called verbal act.

The Court: Yes.

Mr. Decker: It is not my understanding of the law that this is properly within that phase. If something exciting [23] had occurred, or something of that kind, his spontaneous declaration in response to that would be the spontaneous declaration.

The Court: Well, that's the point.

Mr. Decker: But that is not contended for here.

The Court: I was just interested as to whether or not it was because it is an unusual occurrence, and whether or not it falls within that rule is something that would——

Mr. Decker (Interposing): Well, you see, all that had happened up until the time he said this was, he had been snapping this gun.

The Court: Well, but anybody familiar with guns—it was my uncle, who was an old mountaineer, who says, “It is the unloaded gun that kills.” This was drilled into me from the time I was a child. I come from rifle country.

Mr. Decker: Well, my point is, though, that up until the time he said this nothing like an automobile accident, for example, or somebody getting killed, up to this time hadn't happened, so I don't think there is any great exciting event to create the exception to the hearsay rule.

The Court: Oh, I am not going to try to argue

the case for you. I was just asking you if it was there.

Mr. Decker: I don't think so.

(Simultaneous colloquy by Court and counsel.)

The Court: Well, you are going to present intent and [24] frame of mind, and, of course, I want to see those cases and I may want some more research on that. But we will take a look at your cases and then you cited some in your memorandum.

Mr. Murray: Not on this point, your Honor.

The Court: Not on this point. You have raised the point, though.

Mr. Murray: That is right.

The Court: Well, do you have any authorities you want to cite now, Mr. Murray?

Mr. Murray: No, your Honor. No, I haven't at this time.

The Court: Have you any comment to make concerning the so-called frame of mind testimony as it results from the declarations of the deceased person?

Mr. Murray: Well, your Honor, I think that the testimony is hearsay, whether it is designed to establish the condition of the gun or the state of mind of the decedent. If it is the state of mind of the decedent which is relevant, why, of course—(inaudible to the reporter). I think it is a self-serving statement and a hearsay one.

The Court: It is a hearsay statement, no question about that. The question is whether it comes

within the exception to the hearsay rule. Whether or not it is self-serving may or may not be so. I don't know that. As I understand it—— [25]

Mr. Decker (Interposing): Any hearsay is self-serving. You add nothing to it by saying it's self-serving. Hearsay is hearsay.

The Court: But I don't know that it is a self-serving situation. The self-serving, as I understand it, is a statement made by a person who is one of the litigants to serve his own purpose, not the person who is the third party.

Mr. Decker: Don't you think that phrase arose to distinguish hearsay statements which were inadmissible from hearsay statements which were admissible because they were admissions? An admission against interest is admissible, even though hearsay. As opposed to that are hearsay statements which are self-serving.

The Court: But against whom? The witness or the party?

Mr. Decker: Well, the admission, of course, has to be against the interest of a party or it's not admissible.

The Court: Well, is Mr. Harrington a party to this action?

Mr. Decker: No. I don't see that the word "self-serving" helps us any.

The Court: Well, I raised the question. I don't know that it does either.

Mr. Murray: Your Honor, I set no great store by the word "self-serving." [26]

The Court: I do think that it's a hearsay state-

ment, and unless it falls within one of the exceptions to the hearsay rule it is inadmissible. If it falls within one of the exceptions, it's admissible. And that is whether it is self-serving or whether it isn't self-serving. That's my basic view of it. If you gentlemen think otherwise, I would like to hear about it.

But, in any event, I raised the question preliminarily for my own information so I can start research into the question and see if I can't have that one disposed of so that we can proceed with the case. I know we will proceed anyway, but I want to be as prepared as I can for the evidentiary questions.

Now, are there any other evidentiary questions? I take it there are none.

All right. Thank you, gentlemen.

Mr. Murray: Your Honor, I would like to say one more thing.

The Court: Yes, go ahead.

Mr. Murray: Our basic position in this case, your Honor, and the reason I mention it is so that your Honor can hear the evidence with it in mind, is that when a man performs an act which is reckless and dangerous in the extreme, then we think, under the cases that we cited in our brief, and as a matter of law, that the death is not [27] accidental. This is a question entirely apart from whether or not he intended to commit suicide.

The Court: That I understand. I understand that if it does appear to be suicide you won't resist that because that is conclusive, but if it is some-

thing short of that but still does not qualify as an accidental act which brought about death as set forth in the policy, you are not foreclosed from showing it.

Mr. Murray: That is right, your Honor. And we think the facts of this case which are undisputed will show that as a matter of law death was not accidental.

The Court: Well, that's the one I want to test. As I see the problem, then, actually, speaking about suicide is not the important argument. The argument is whether or not the conduct that will be described by the evidence will fulfill the qualification that it must have produced death accidentally by some accidental act.

Mr. Murray: That is one of the questions, your Honor.

The Court: Well, that is the question, isn't it?

Mr. Murray: Whether it was accidental within the meaning of the policy, that's right.

The Court: Well, you claim it isn't and you are not too much concerned about whether it is suicide. If it is, you have no quarrel with it, but you just say it falls short of accidental. [28]

Mr. Murray: That's right. By whatever theory.

The Court: And your burden is to establish that it was accident as that term is used in the policy, isn't that right?

Mr. Decker: That is right, your Honor. I am sure you understand I differ from counsel as to what the test is.

The Court: Well, yes. I am not asking you to concede anything.

Mr. Decker: Because in putting on my case I will be following my theory as to what the law is.

The Court: Why, surely. The only thing is, I hope that if your theory is correct, is it this, an argument about what the law is?

Mr. Decker: Yes, it is.

The Court: And not an argument about what the facts are?

Mr. Decker: That is correct. Counsel and I are pretty much in agreement that it is a question of law you are faced with in this case.

The Court: Can you stipulate as to the facts?

Mr. Murray: Well, your Honor, I think the facts are important in providing the framework and the background.

The Court: Why, I am sure they are.

Mr. Decker: I will tell you why we can't, your Honor. The question as to whether or not this was an accident within [29] the meaning of the policy is a matter that can only be determined by circumstantial evidence. The decedent is not here to tell us what his state of mind was. It can only be gathered by the circumstances.

The Court: Well, can you stipulate as to what the circumstances were?

Mr. Decker: Well, some of the circumstances are the appearance of the wife, the appearance of the little boy. There are some circumstances here that cannot be stipulated to.

The Court: You mean how I would weigh their testimony?

Mr. Decker: Yes, how the trier of the fact would——

The Court: If I interpret the evidence one way, the question will be determined as a matter of law one way; and if I interpret the evidence another way, it will be determined as a matter of law the other way; is that the point?

Mr. Decker: Yes, I think that is correct.

The Court: All right. Then if I have to weigh evidence I will have to do that. But you almost had me in the frame of mind that this was going to be an uncontested matter as to what happened, and the question was purely a question of what was the law in view of a stipulated state of facts.

Mr. Murray: Your Honor, our position, I think perhaps diverges just a bit from Mr. Decker's. We think that the [30] undisputed evidence will show as a matter of law that the death was not accidental, if your Honor accepts our view of the law, and we think our view of the law is the law, in view of the law established by the cases.

The Court: All right. Well, Mr. Decker is not required to accept that.

Mr. Decker: No. As a matter of fact, this issue is posed very sharply in our brief, your Honor.

The Court: Yes, I know the argument is there. The only point I am getting at is, can we narrow the facts down to a bare minimum so I can get to this question of law. I haven't researched what the law is on it. I have just read a few cases on the

subject as I go along. I have heard about this problem and I know it is in this area, where there is a self-inflicted wound that produces death, there is usually an argument about it.

It may or may not be by gunshot. It may be by other means. This isn't the only cases of this kind that has occurred in the history of insurance policies.

Mr. Decker: Not by a long shot. There are a lot of them.

The Court: The law books have quite a number of them, with variations on this same theme. So I presume I will have to find out what I presume the evidence to show before I can determine which principle of law to apply. [31]

Mr. Decker: I think that's right, your Honor.

The Court: Although Mr. Murray takes the position that, under the uncontested facts, I will have to, as a matter of law, take the view that there is no liability here.

Mr. Murray: I think that according to plaintiff's view of the evidence there is no liability as a matter of law.

The Court: All right. Thank you.

Will you proceed?

Mr. Decker: Will you take the stand, please, Mrs. Harrington?

JOYCE ANTONIA HARRINGTON

called as a witness in her own behalf, being duly sworn, testified as follows:

The Clerk: Please state your full name to the Court.

The Witness: Joyce Antonia Harrington.

The Court: Now, before we proceed, Mrs. Harrington, if at any time these proceedings become distressing to you or if there is any problem, just ask for a period of time and we will take a recess. We will proceed calmly. I just want to make it as easy as possible in terms of getting this story. I want the accurate story, but we will proceed in accordance with your desires insofar as your comfort or discomfort are concerned.

The Witness: Thank you, your Honor.

The Court: All right, Mr. Decker, will you proceed? [32]

Direct Examination

By Mr. Decker:

Q. Your name is Joyce A. Harrington?

A. Yes.

Q. And, Mrs. Harrington, you are the widow of Arnold Harrington? A. Yes.

Q. Where do you live?

A. 716 Spruce Avenue, South San Francisco.

Q. Are you employed?

A. Yes, by the Bank of America.

Q. And what do you do there?

A. I am a teletype operator.

(Testimony of Joyce Antonia Harrington.)

Q. Where did you get your education, Mrs. Harrington? A. In China.

Q. How far did you go in school?

A. I went two years of junior college and a year at the University of St. John's.

Q. I take it you were born in China?

A. Yes, I was.

Q. How old are you? A. I am thirty-five.

Q. Mrs. Harrington, under what circumstances did you meet your husband?

A. I was employed by the Navy laboratory in China. [33]

Q. Where in China? A. In Shanghai.

Q. When was this? A. This was in '46.

Q. 1946? A. Yes.

Q. Was he also employed there?

A. He was in charge of the laboratory.

Q. Was this a naval installation?

A. Yes.

Q. Was he in the Navy at the time?

A. Yes, he was.

Q. Do you know whether he had been married before?

A. He had been married once before, but it was a very short marriage and it was terminated within two months or thereabouts.

Q. Do you know when Mr. Harrington was born? A. Yes. On September 23rd, 1921.

Q. And so to recapitulate, when you met him in 1946 he would have been what? Twenty-five years old? A. Twenty-six, I believe.

(Testimony of Joyce Antonia Harrington.)

Q. I see. Had you been married before, Mrs. Harrington? A. No.

Q. You had not. What was his rating in the Navy at that time? [34]

A. He was First Class Pharmacist's Mate.

Q. Do you know whether he had been—whether he had seen active service where he had been accustomed to using guns?

A. Yes, he was in combat in Italy, China, Africa, and I don't think he saw combat in India, but he was there.

Q. I see. How far had Mr. Harrington gone in school, if you know?

A. He went to junior college in Maquoketa, Iowa.

Q. And, by the way, is that where he was from?

A. Yes. He was born there.

Q. What was the date of your marriage to Mr. Harrington? A. March 9, 1947.

Q. In Shanghai? A. Yes.

Q. And how long did you reside together in Shanghai following your marriage?

A. Eight days.

Q. Then what did you do?

A. We came directly to San Francisco.

Q. How long had you known Mr. Harrington before you and he were married?

A. About a year.

Q. And you came with him to San Francisco?

A. Yes. [35]

Q. Where did you go from there?

(Testimony of Joyce Antonia Harrington.)

A. To Maquoketa, Iowa.

Q. Did Mr. Harrington remain in the Navy following your marriage? A. Yes, he did.

Q. How long? A. Until 1951.

Q. And where all was he stationed during that period from 1947 to 1951?

A. At 50 Fell Street, Twelfth Naval District, in San Francisco.

Q. I see. So following his leave after overseas service he came back to San Francisco where he was stationed at the Fell Street Dispensary?

A. Yes.

Q. You and he lived together here in San Francisco, then, during that period?

A. Yes, and South San Francisco.

Q. In South San Francisco. What was his job at the naval installation on Fell Street?

A. Laboratory work.

Q. I gather from what you have said that he did not re-enlist, or he left the service in 1951.

A. Yes.

Q. What did he do then? [36]

A. We went to Panama.

Q. How long did you stay there?

A. Two months.

Q. Was he employed there?

A. Yes, by the United Fruit Company.

Q. In what capacity?

A. Also in the laboratory research.

Q. And you went with him? A. Yes.

Q. Were there any children by this time?

(Testimony of Joyce Antonia Harrington.)

A. There were two children and one on the way.

Q. I see. How many children do you have, Mrs. Harrington? A. I have five children.

Q. Mr. Harrington is the father of them all?

A. Yes.

Q. What are their names?

A. Arnold Harrington, Jr., Sylvia, Frances Ann, Terry Lee, and Kim.

Q. And where are the children now?

A. Two of my oldest children are with me and three of the younger ones are in Maquoketa, Iowa.

Q. With your husband's parents?

A. With my husband's parents, yes.

Q. I see. You remained in Panama some two months? A. Yes. [37]

Q. Then what did you do?

A. We came back and he worked for Dr. Beare. He continued working for him.

Q. Who is Dr. Beare?

A. He was my husband's employer before we left for Panama.

Q. Had he been stationed at the Fell Street installation, too? A. No, he is a civilian doctor.

Q. Oh, I see. Where is Dr. Beare's office?

A. At present he is at Stonestown Medical Building.

The Court: Is he a medical doctor?

The Witness: Yes.

The Court: Was this in connection with his practice or was he doing research?

The Witness: No, he is a general practitioner.

(Testimony of Joycè Antonia Harrington.)

The Court: A general practitioner and your husband was a laboratory technician for him?

The Witness: Yes, sir.

Q. (By Mr. Decker): I take it from what you have said that while your husband was still stationed here and employed by the Navy at Fell Street he was doing work, extra work, sort of, for Dr. Beare?

A. Yes, he was. He had a part-time job with Dr. Beare before he left the Navy.

Q. I see. Then did that job become full time before you [38] left for Panama, as you have testified to? A. Yes.

Q. So he worked for Dr. Beare full time for a while? A. Yes.

Q. Before he took the United Fruit job?

A. Yes.

Q. And after two months in Panama he returned and resumed his employment with Dr. Beare, is that correct? A. That is right.

Q. Now, how long did he work full time for Dr. Beare after coming back from Panama?

A. I don't know the exact time, but it was over a year, and he went over to St. Luke's then.

Q. So he worked approximately a year or thereabouts for Dr. Beare at Stonestown?

A. Well, first at Lakeside Medical Manor and then they moved to Stonestown.

Q. I see. And then he left that employment and became employed at St. Luke's Hospital?

A. Yes.

Q. Do you remember the year that he started his

(Testimony of Joyce Antonia Harrington.)

employment there? A. No, I don't.

Q. When your husband first started to work for St. Luke's what was his job there? Was he an assistant or was [39] he the chief laboratory technician?

A. No, he was just one of the laboratory crew.

Q. One of the crew? A. Yes.

Q. And later on did his job change?

A. Yes; because of his advanced knowledge, he was to become chief technician.

Q. How long did he work there before he became chief technician?

A. I don't quite remember.

Q. How long had he been chief technician there before he died, approximately?

A. Oh, about three years, I think.

Q. I see. Then the other three children were born after you came back to San Francisco from this Panama trip? A. Yes.

Q. You live now at 716 Spruce Street in South San Francisco, do you not, Mrs. Harrington?

A. Yes.

Q. How long have you lived there?

A. Within the last five years.

Q. And before that where did you live?

A. In South San Francisco on Railroad Avenue.

Q. Did you rent the property at Railroad Avenue? A. Yes. [40]

Q. And what about this Spruce Street house? Do you rent that or did you buy it?

A. We were buying it because we had difficulty

(Testimony of Joyce Antonia Harrington.)

—I mean because there were so many children that they didn't want us to live on Railroad, so we had to buy this house.

Q. I see. Now, at the time immediately prior to your husband's death what was his salary?

A. He made—well, with his overtime it was \$1,200, I think.

Q. \$1,200 per what? A. Per month.

Q. Per month? Did you have any financial problems?

A. No, except outside of the regular charge accounts and the house payment.

Q. That is, you had no bills other than charge accounts and the house payments? A. Yes.

Q. Well, do you mean by charge accounts just your current living costs or was there some excessive account or problem account?

A. No, we had charge accounts with the department stores and paid them within the month.

Q. You weren't behind on any of those, in other words? A. No.

The Court: How about the house payments? Were those [41] up? Were they current?

A. I don't understand.

Q. (By Mr. Decker): Were you paid up on your house payments? Did you owe any money—well, that isn't the way to put it, either. Were you behind on your payments on the house?

A. No, not at all.

The Court: That is what I meant by "current."

A. I see.

(Testimony of Joyce Antonia Harrington.)

The Court: They were paid up to date?

The Witness: Yes.

The Court: Were you in debt otherwise?

The Witness: No, sir.

The Court: Did you have any accumulations of savings or other property?

The Witness: No, sir. Not with five children.

The Court: In other words, to sum it up in one word, you were living within your income but you had no large outstanding debts?

The Witness: No, we were just catching up to the time before.

The Court: Well, were you caught up by that time?

The Witness: Yes.

Q. (By Mr. Decker): Did you own an automobile, Mrs. Harrington? [42]

A. Yes, we did.

Q. What kind of car was it?

A. It was a 1957 Studebaker.

Q. Was it paid for? A. All except \$300.

Q. How about the furniture in the house? Was that all paid for? A. Yes.

Q. You indicated that your husband had had some advanced training. What did you mean by that?

A. While he was in the service and he was stationed overseas he went to the different schools over there whenever he could, like the Pasteur Institute in Shanghai. He went to—I don't know all the schools he went to in Italy and Africa, but he did

(Testimony of Joyce Antonia Harrington.)

very far research on bacteriology and hematology.

Q. I see. Did he continue his educational activities in his field after you came back after your marriage? A. Only on his own.

Q. What do you mean by that?

A. He didn't go to school.

Q. I see.

A. He read at home and studied at home.

Q. I see. Did he appear to you to be interested in his job? A. Very interested, yes. [43]

Q. He appeared to you to like his job?

A. Yes. He would bring it home with him.

Q. What interests did he have other than his employment?

A. He was very fond of his gun collection, which he until then could only afford that year, and also in ham radio—amateur radio operation.

Q. Did he have some radio equipment there at 716 Spruce Street? A. Yes.

Q. Where was it located?

A. In the basement.

Q. Did you pursue this hobby with him?

A. Yes, I did.

Q. And he was a licensed amateur radio operator? A. Yes.

Q. Were you? A. Yes.

Q. I see. About what would you say was the amount of your investment in radio equipment?

A. I don't know exactly, but it was quite a bit.

Q. You indicated in your testimony that with

(Testimony of Joyce Antonia Harrington.)

respect to the gun collection he had added to it fairly recently? A. Yes.

Q. I believe you said something about him not being able to afford it before; is that what you said? [44] A. Yes.

Q. What did you mean by that?

A. Well, before he made this large salary we could not afford to buy guns and things for him, and he only pursued amateur radio.

Q. I see.

A. And he had, I think, one or two guns. But in 1960 when things were beginning to—I mean when we were not in a financial difficulty, he started—then he could afford to buy the guns he wanted.

Q. Did you work at any time during your marriage, Mrs. Harrington? A. Not at all.

Q. You never did? A. Never.

Q. How old is your youngest child, Mrs. Harrington? A. He is five.

Q. And your oldest, Arnold, is——

A. Twelve.

Q. Twelve now? A. Yes.

Mr. Decker: Your Honor, there is one thing I might have discussed in the opening statement, and that is we are going to have Exhibit A in this matter, being the gun involved, and I don't want to upset anybody. I have been [45] handling it and it's not loaded. I know that. I have it here and would like to show it to the witness and have her identify it, and later in the day there will be a gun expert here to testify about the gun.

(Testimony of Joyce Antonia Harrington.)

The Court: If there is no problem insofar as she is concerned. I don't think there is any dispute about it being the gun involved. I think Mr. Murray might stipulate to that.

Mr. Murray: I would, your Honor. So far as I know, that was the gun that was involved.

The Court: Well, subject to verification will you stipulate it is the gun involved in this case?

Mr. Murray: Certainly. I will be happy to.

The Court: Then that will save some of the questions about it, won't it, Mr. Decker?

Mr. Decker: Yes. I just want her to identify it.

The Court: Then it will be admitted into evidence as Plaintiff's Exhibit 1. That will be the gun and holster.

(Gun and holster referred to were received in evidence and marked Plaintiff's Exhibit No. 1.)

Q. (By Mr. Decker): Mrs. Harrington, referring now to Plaintiff's Exhibit 1 in evidence, which is the gun, about when did your husband acquire that gun?

A. That was his most recent—most recently acquired gun.

Q. About how long had he had it before this accident [46] took place—this incident took place?

A. I am not sure.

Q. Just a little while, then? A. Yes.

Q. Do you know whether he had had occasion to fire it? A. I don't know.

(Testimony of Joyce Antonia Harrington.)

Q. Do you know whether or not, from your observation, he was familiar with the gun?

A. He was thoroughly familiar with all his guns.

Q. Your husband belonged to a gun club of some kind, didn't he?

A. Yes. The South City—South San Francisco Rod and Gun Club and the National Rifle Association.

Q. Describe for us what his practice was with respect to firing his guns.

A. He would take very good care of them and each time that they had been fired he would take the whole gun apart and clean every movable part.

Q. How often did he fire the guns?

A. As far as I know, about once a week, or mostly twice a week, I would say.

Q. At the most twice a week? A. Yes.

Q. Where would he go to do this?

A. He went to the rifle range at Sharps Park. I have [47] never gone there with him so I don't know which one it is.

Q. By the way, Mrs. Harrington, how did you feel about these guns? What was your reaction to all this?

A. I don't like them. I have always had an adverse attitude towards them.

Q. Did you indicate this to your husband?

A. Yes. That is why I don't know if he had fired the gun or not before.

Q. Well, what do you mean?

(Testimony of Joyce Antonia Harrington.)

A. I don't know whether he had fired this particular gun or not because I don't care to know.

The Court: You mean out on the range?

The Witness: Yes.

The Court: You don't know whether he went out and practiced?

The Witness: No.

Q. (By Mr. Decker): In other words, unlike the radio hobby, you didn't take any interest in this particular activity of your husband's?

A. No.

Q. Was there some—was this kind of a sore point between you?

A. Yes, because I just didn't like them.

Q. Now, Mrs. Harrington, was your husband right handed or left handed? [48]

A. He had been left handed when he was a young boy, but I think he tried to change, and they say that his stutter was the result of that. I don't know.

Q. Did he stutter? A. Yes, he did.

Q. Was this a severe problem?

A. It had been better in the last few years before his death.

Q. I see. So far as you were able to observe, though, he favored his right hand, I take it?

A. Yes.

Mr. Decker: Does the Court want to take a recess or shall we go right ahead? It makes no difference to me.

(Testimony of Joyce Antonia Harrington.)

The Court: I think maybe we should take our recess now.

I just want to get this subject matter straightened out in my mind now. I don't know that it is of any great moment. You say that he was left handed or you understand that he was left handed as a youngster?

The Witness: His mother told me that he was left handed and so did he, but they corrected it.

The Court: Well, he or they?

The Witness: They did, meaning his mother and his teachers, I believe.

The Court: Well, was he ambidextrous or did he, after [49] the change, use his right hand as his major hand?

The Witness: He used his right hand as his major hand. I wouldn't say he was ambidextrous.

The Court: For instance, in throwing a baseball which hand did he throw it with?

The Witness: He didn't play baseball.

Q. (By Mr. Decker): What did he write with? Which hand did he write with?

A. With his right hand.

The Court: He wrote right handed?

The Witness: Yes.

The Court: Did he use a fork with his right hand when eating?

The Witness: Yes, sir.

The Court: And, well, handling a gun, which hand would he use? Which hand would he handle the gun with? I don't know whether you saw him

(Testimony of Joyce Antonia Harrington.)

handle very many. I mean, did he handle them right handed or left handed?

The Witness: I believe the right hand.

Q. (By Mr. Decker): Which hand did he use to operate the telegraph key when he communicated? A. His right hand.

Q. His right hand? A. Yes.

The Court: In other words, in all of these types of [50] activity where he would either use an instrument or engage in some activity which required the use of hands, he would use the right hand?

The Witness: When the work was precision.

The Court: Now, did I correctly understand you to say that he stuttered, but that the stuttering had improved during the later years?

The Witness: Yes, sir.

The Court: And when you say it had improved, do you mean that he spoke without any speech impediment?

The Witness: Yes, except when he met a stranger or he was—or the occasion was very formal, he had a tendency to stutter.

The Court: He still had under excitement and stress a speech impediment?

The Witness: Yes.

The Court: But this had changed considerably since the time you married him?

The Witness: Yes, it had improved very much, your Honor. Perhaps it wasn't as noticeable with others as it was with me.

The Court: What do you mean by that?

(Testimony of Joyce Antonia Harrington.)

The Witness: Because I know him so well—I knew him so well.

The Court: You mean a person who didn't know him [51] wouldn't observe his impediment as much as you who knew him very well?

The Witness: Yes.

The Court: This is not uncommon. This is usually true. Well, are you trying to tell me that as a general matter his speech impediment would only be noticed by you or by those who were really close to him, it was so slight?

The Witness: Yes.

The Court: Is that your point?

The Witness: Yes.

The Court: Then we will take the mid-afternoon recess and after recess we will go forward.

(Short recess.)

Q. (By Mr. Decker): Mrs. Harrington, I want to discuss with you the events of February 5, 1960. Did your husband work that day?

A. No, he did not.

Q. Why not?

A. Due to a slight reaction from his flu shot.

Q. Did you leave the home that day?

A. Yes, I went to see my—I went to Chinatown with a girl friend of mine.

Q. How did you go?

A. My husband took us both.

Q. Did your friend live in South San Francisco, too? [52]

(Testimony of Joyce Antonia Harrington.)

A. No, she lived in San Francisco and I was asked to call her if she would like to go with me, and we went together.

Q. I see. So your husband drove you to her house and picked her up—— A. Yes.

Q. ——and then drove you both down to Chinatown? A. Yes.

Q. About what time did you leave home?

A. I don't know. Approximately about ten to eleven, I believe.

Q. And who did you leave behind?

A. The children that didn't go to school.

Q. And which ones were those?

A. I think it was—oh, it was just Kim, the little one.

Q. Just the baby? A. Yes.

Q. And your husband then dropped you off in Chinatown about 10:30 or 11:00 o'clock in the morning, something of that kind? A. Yes.

Q. You had an arrangement with him as to how you were going to get back home?

A. Yes, I was to call him at 3:00 o'clock.

Q. Did you? A. No. [53]

Q. What did you do?

A. I went to a girl friend's house, and because I am a Roman Catholic and I had not been married in my church before to Harrington, I had always been seeking to be married in my church, and that day a student from USF was visiting. He was a student in theology and I was talking to him on the subject of—on the problem of my marriage.

(Testimony of Joyce Antonia Harrington.)

Q. I see. And where was this discussing taking place? A. At my girl friend's home.

Q. Is that the same girl friend who had accompanied you to Chinatown? A. Yes.

Q. So you and she had left Chinatown and returned to her residence that afternoon?

A. Yes.

Q. About what time was it when you did call your husband?

A. Approximately 6:00 o'clock.

Q. Around 6:00? A. Yes.

Q. Did he come to get you?

A. Yes, he did.

Q. Was he angry?

A. Yes, he was considerably irritable about my being late.

Q. Did you proceed directly home?

A. Yes. [54]

Q. When you got home you parked the car in the garage? A. No, we left it outside.

Q. And you and your husband went in the house together? A. Yes.

Q. Had you eaten? A. No, I had not.

Q. Had your husband and the children eaten?

A. Yes.

Q. Were all the children there when you got home with your husband around 6:00 o'clock?

A. Yes, they were.

Q. What happened then, Mrs. Harrington?

A. Well, he was scolding me about being late

(Testimony of Joyce Antonia Harrington.)

and as a defense I didn't talk. I just ignored him and wouldn't speak to him.

Q. Did you eat?

A. Yes, I did. I ate alone.

Q. And what was he doing during the time you were eating, and generally in that period of an hour or two after you got home?

A. I don't remember exactly, but I believe he was—oh, since I didn't speak to him, he began to pursue his hobby. He was cleaning—he was getting the guns out to clean.

Q. I see. The children were up at this time?

A. No, they went to bed except for Arnold. He was making [55] a research on his book report.

Q. He was doing his homework? A. Yes.

Q. Did your husband, if you recall, have anything to drink during that period while you were eating and while he was getting out his guns?

A. Yes. I know that he had because I saw the glass on the table and the bottle.

Q. In the living room? A. Yes.

Q. On the coffee table? A. Yes.

Q. Now, did your husband leave the home at any time that evening? A. Yes, he did.

Q. Now, I want you to tell me, if you can recall, do you recall seeing the bottle and knowing that he had something to drink before he left the home or after? A. I don't know.

Q. You are not sure about that? A. No.

Q. And what about your saying that he got out

(Testimony of Joyce Antonia Harrington.)

his guns? Do you recall whether he did that before he left the house or after he returned?

A. To the best of my memory, I think he did that before, [56] because I didn't talk to him and it was quite early in the evening.

Q. I see. About what time was it that he left the house? A. I don't know.

Q. How long was he gone?

A. About from half an hour to three-quarters of an hour.

Q. You don't know where he went?

A. No, but I assumed it was at the beach.

Q. Did he have a custom and practice of going out in the evening by himself?

A. No; only when he was perplexed or he was angry with me he would calm himself by going and sitting by the beach for a little time and then he would come back.

Q. You think that is what he did that night?

A. Yes.

Q. All right. About how long was it before this incident occurred that he returned to the house?

A. Would you rephrase that? I didn't understand.

Q. Some time after he returned to the house the incident took place that we are concerned with here, with the gun. A. Yes.

Q. I would like to have you tell us, to the best of your ability, about how long it was that this incident took place after he returned from going out?

A. Very shortly. [57]

(Testimony of Joyce Antonia Harrington.)

Q. It wasn't very long? A. No.

Q. Can you give us an estimate in terms of minutes or hours? A. I could not.

Q. Would you say that it was somewhere—well, was it more than an hour, do you think?

A. Oh, no.

Q. It was less than an hour? What did he do when he returned?

A. He asked me to make up with him, and I wouldn't do it.

Q. Where were you at that time?

A. I was sitting on the couch and I was putting up my hair.

Q. And was it at this time that all the children were in bed except Arnold? A. Yes.

Q. What did he do when—I take it he came into the living room where you were sitting?

A. Yes.

Q. And what did he do when you refused to speak to him?

A. Well, he was annoyed because I wouldn't make up with him, and I think he went and he started to clean his gun again, I suppose.

The Court: When you say you wouldn't make up with him, [58] do you mean you didn't talk to him?

The Witness: Yes, I refused to talk to him.

Q. (By Mr. Decker): Do you recall seeing him in the room after him coming in and asking you to make up and your not speaking to him?

A. I saw him, yes.

(Testimony of Joyce Antonia Harrington.)

Q. Where was he in the room after that?

A. He was sitting at his favorite place on the couch.

Q. In the living room? A. Yes.

Q. Same couch you were seated on?

A. Yes.

Q. Was he to your right or your left?

A. To my left.

Q. And you were putting up your hair, you say?

A. Yes.

Q. You were dressed for bed, were you?

A. Yes.

Q. What was he doing as he sat there on the couch to your left?

A. I think he was cleaning his gun.

Q. Was it this gun that is in evidence here?

A. Yes.

Q. What was he using to clean it with?

A. He usually used a chamois. [59]

Q. Do you have any recollection of seeing this chamois on this particular night?

A. Yes. It was on the coffee table.

Q. Do you have any recollection of him fixing a drink or a drink being fixed for him after he returned?

A. No, I don't.

Q. You do remember the glass and the bottle on the table?

A. Yes.

Q. Did he appear to you to be intoxicated when he returned from going out that evening?

A. No.

Q. What is the next thing that you can recall

(Testimony of Joyce Antonia Harrington.)

now that you observed or that caught your attention after you were aware of him sitting there to your left on the couch in the living room cleaning the gun?

A. Well, since I would not look at him and I wouldn't speak to him, I was watching the television program, and then my attention—I mean, the sound that attracted my attention was that I heard him clicking the gun, I think.

Q. That's the next thing you recall?

A. Yes.

Q. Now, Mrs. Harrington, was the sound that you heard this sound? (Demonstrating.)

A. No, it was louder.

Mr. Decker: May the record show that I was just [60] snapping the trigger, pulling the trigger with my index finger, with the gun on the safe position, and the hammer in the firing position?

Q. Was the sound that you heard this sound? (Demonstrating.) A. Yes.

Mr. Decker: And may the record show that that sound was made by my pulling the hammer to the cocked position with the safety mechanism on "Safe" and releasing the hammer by energizing the trigger, pulling the trigger?

Q. After hearing this sound—and, by the way, if you can remember, about how many times did you hear that sound while he was still sitting there?

A. I heard it several times, but I don't know exactly how many times.

(Testimony of Joyce Antonia Harrington.)

Q. All right, now, what is the next thing that you can recall that happened after that?

A. I asked him not to do it, and I told him it made me nervous to hear him do that.

Q. Was he still seated when you said this to him? A. No, he was standing.

Q. Do you recall seeing him get up?

A. No. I knew he was standing because he was in front of me.

Q. Where did he stand with relation to your position on the couch? [61]

A. Directly in front of me between the—the coffee table was between us.

Q. I see. So he was standing right across the coffee table from you? A. Yes.

Q. And he was in that position when you asked him not to make this noise? A. Yes.

Q. Had any of the noise that you heard and that you have just described, had any of those noises been made while he was standing in that position and before you said, "Don't do it"?

A. Yes, I think so.

Q. All right. Now, when you said, "Don't do it," as you have indicated, did you look up at him at that point?

A. Yes, I did and I saw the gun in his hand.

Q. Which hand was it in?

A. His right hand.

Q. And did you actually see him or were you watching him at a time when he made this noise with the gun?

(Testimony of Joyce Antonia Harrington.)

A. No, because I didn't speak to him, so I didn't want to look at him either.

Q. You did look up and saw him standing there with the gun in his right hand?

A. Yes. [62]

Q. But you looked away then, is that right? Is that the idea? A. Yes.

Q. All right, then, what is the next thing that happened?

A. He saw I was very annoyed, and I was afraid, you know, and he said—he tried to show me——

Mr. Murray: Forgive me, Mrs. Harrington. I think an objection is appropriate at this time.

The Court: Make your objection.

Mr. Murray: My objection is that the answer calls for hearsay testimony, hearsay statements on behalf of Mr. Harrington, statements which are inadmissible. I object on that ground.

Mr. Decker: Well, I haven't asked the witness to tell us anything Mr. Harrington said. I asked her what was the next thing that happened. However, I am aware of the fact that she might very well volunteer what he said.

The Court: Well, what you are objecting to, Mr. Murray, is that it will be hearsay as to any conversations?

Mr. Murray: Yes, your Honor.

The Court: Then I will just take the ruling on that objection under advisement and the testimony may be received subject to the objection, and I will

(Testimony of Joyce Antonia Harrington.)

just simply have to examine into the matter and rule on it, and any testimony that is given will be subject to a motion to strike on the [63] same grounds upon which the objection has been made. Your objection and the motion can run to all testimony, since the objection has been made, as to conversations by Mr. Harrington which were made prior to the time of his death.

Mr. Murray: Thank you, your Honor.

The Court: Now, there have been conversations answered by this witness without objection up to now. They are simply in the record as being in the record without objection. I don't know whether that **adds anything** or subtracts anything from your objection, but I call it to your attention so the record will be clear. In other words, she has testified to conversations and acts that occurred leading up to this particular moment.

Mr. Murray: Well, I take it, your Honor, that what we are coming to now is a statement by, alleged statement by Mr. Harrington which is crucial.

The Court: In part.

Mr. Murray: And it is this one that I have my objection to.

The Court: All right, your objection is noted for the record and I will reserve ruling. I will hear the testimony subject to the objection and the motion to strike in the event the objection is valid.

Mr. Murray: Thank you, your Honor.

The Court: Proceed, Mr. Decker. This goes only to [64] the conversations.

(Testimony of Joyce Antonia Harrington.)

Mr. Decker: Yes.

Mr. Murray: Yes.

Q. (By Mr. Decker): Now, Mrs. Harrington, I think the last question I directed to you was—strike that. Let's go back to this: You testified that you looked up and saw him standing with the gun in his right hand, and at or about that time you said something about, "Don't do that; it makes me nervous"; right? A. Yes.

Q. And then I think you said you looked away?

A. Yes.

Q. Now, what is the next thing—withdraw that. Did you look back up again?

A. No, I did not. But he did try to show me that it was perfectly safe, that the safety was on.

Q. Let me ask you this, then: After you had observed him standing there and then had looked away, did he say or do anything which caught your attention? A. (No response.)

Q. What is the next thing that happened? Let me put it that way. What did you hear or see?

A. Well, he was clicking the gun.

Q. He continued to click the gun?

A. Yes. [65]

Q. And that's the same click that we just described a moment ago?

A. Yes, because he knew it annoyed me.

Q. All right. And this was after you had asked him not to do it? A. Yes.

Q. Then did he stay in the same position while he continued to click the gun?

(Testimony of Joyce Antonia Harrington.)

A. Yes, he did.

Q. And about how many clicks do you remember hearing at this time?

A. Oh, I don't remember.

Q. You just remember the clicking?

A. Yes, I know he clicked the gun.

Q. All right. And then what is the next thing that happened?

A. When he clicked it again I asked him not to do it.

Q. Was this a second time? A. Yes.

Q. All right.

A. And he said, "Don't worry." He was annoyed because I didn't have confidence in him. He said, "Don't worry. The safety is on."

Q. What happened then?

A. Then he said, "I will prove it to you," and so he [66] pointed it towards his temple and he clicked it and that is when it went off.

Q. You were looking at him at that moment?

A. Yes.

Mr. Murray: May I interrupt for a moment?

The Court: Yes.

Mr. Murray: Your Honor, I have my prior objection, of course, and I also object to the conclusion as to the reason the witness says Mr. Harrington was annoyed. I think that is a conclusion, too, your Honor.

The Court: Well, I am sure it is a conclusion and you are entitled to object to opinions and conclusions, although the conclusion may be more

(Testimony of Joyce Antonia Harrington.)

formal than real. But since you have made the objection, why, I think that technically the objection is sound, and it may be practically a sound one, too.

If you want to cover it in a more direct manner, Mr. Decker, other than conclusions that he was annoyed——

Mr. Decker: Yes, I will do that, your Honor.

The Court: If you want to do that I will permit it. My own view of it is that this is one of these expressions by a witness which is a conclusionary statement of what actually occurred.

Mr. Decker: And, as such, admissible.

The Court: Yes. But it's a close question and it is [67] one that I have to interpret, and since I have to interpret it I would rather have the evidence in a more satisfactory manner.

Mr. Decker: May I suggest, your Honor, we come back to this? I have a witness here whom I would like to put on out of order.

The Court: Certainly.

Mr. Decker: You have no objection, Mr. Murray?

Mr. Murray: No.

Mr. Decker: Will you step down for a moment, Mrs. Harrington?

(Witness temporarily withdrawn.)

Mr. Murray: So that the record may be formally correct, may I make a motion to strike that part of the witness' testimony which is a conclusion?

The Court: Yes, and I will deny that motion on the basis that I think it is more semantical than real.

Mr. Murray: Thank you, your Honor.

Mr. Decker: Mr. Moore, will you take the stand, please?

RAY LESTER MOORE

called as a witness on behalf of the plaintiff, being duly sworn, testified as follows:

The Clerk: Please state your full name to the Court.

The Witness: Ray Lester Moore. [68]

Direct Examination

By Mr. Decker:

Q. Mr. Moore, what is your occupation?

A. Gunsmith.

Q. You are a gunsmith? How long have you been a gunsmith?

A. About thirty-six years.

Q. That is, you have been making your living as a gunsmith for that length of time?

A. Right. Practically all that time, yes.

Q. Where are you employed now, sir?

A. Roos-Atkins.

Q. Roos-Atkins, in the Gun Shop?

A. In the Gun Department, yes.

Q. What kind of work does a gunsmith do, Mr. Moore?

A. Well, it pertains to a lot of different things. Making and repairing.

Q. Making and repairing firearms?

(Testimony of Ray Lester Moore.)

A. Refinishing.

Q. Are you familiar generally with all kinds of firearms that are in use? A. Most all types.

Q. And in particular are you familiar with this particular type of gun, and I am showing you now Plaintiff's Exhibit No. 1 in evidence? [69]

A. Yes, I have had considerable experience with them.

Q. Have you examined that particular gun at my request, Mr. Moore? A. Yes.

Q. I would like you, if you will, sir, to show us or to show his Honor how the safety mechanism works on that particular gun, and you can demonstrate it any way you think necessary.

A. There is a "On Safe" and a "Off Safe" position, as we all know. It is safe now. It will click and it will go. Now it is off safe. That is when you fire. Your gun shouldn't fire in that position.

The Court: This gun should not fire——

The Witness (Interposing): It should not, but there is a chance that—it might be among a million—that it would.

Q. (By Mr. Decker): Well, let's go into this in some detail, Mr. Moore. So far you have just demonstrated the safety mechanism itself and the two positions that it has, is that correct?

A. Yes.

Q. One is a position where the gun will not fire even though the trigger is pulled and the hammer falls? A. Right.

Q. And the other position is in the——

(Testimony of Ray Lester Moore.)

A. The firing position. [70]

Q. —the firing position. The gun is fully armed in that position and will fire upon being cocked and pulling the trigger, right?

A. Right.

Q. Now, will you show us what is the mechanical function or how the safety functions mechanically?

A. Well, inside—

Q. You can break down the gun, if you wish, Mr. Moore, and show us.

A. Inside the safety there is a cam that cams into the hammer. You would have to have a paper and everything else to take it apart.

Q. Well, go right ahead. Do you want some paper to protect the desk?

A. Yes.

The Court: Well, I think maybe you can give me the principle of the thing. When the safety is on and the hammer is released by the trigger, is there some object that intervenes between the hammer and the shell?

The Witness: Yes, on the safety itself between the hammer and the frame.

The Court: And the hammer then comes against the—

The Witness: The safety notch inside, yes.

The Court: And therefore will not explode the shell which may be in the barrel? [71]

A. That is true. It's not supposed to.

Q. (By Mr. Decker): It won't strike the firing pin?

(Testimony of Ray Lester Moore.)

A. The hammer is away from the pin in that position.

The Court: Even though the hammer is released by the trigger from the cocked position?

The Witness: That's right. It's still on safe.

Q. (By Mr. Decker): This is what is referred to as an "internal safety"?

A. That's right. See, that is on safe. The cam is in between the frame and the hammer.

The Court: So that the hammer will not hit the firing pin?

The Witness: No, it's not allowed to hit the firing pin.

The Court: And the firing pin, of course, hitting the firing pin is that which would cause the shell to explode?

The Witness: That causes the explosion.

The Court: All right, now, is there anything else you want to show about the mechanism of the gun?

Mr. Decker: Yes, your Honor. I have a series of questions I want to ask to bring out all the various possibilities here.

Q. Mr. Moore, let us assume that the gun is fired with just one bullet in the clip. What position will the gun be in after that single bullet is discharged? [72]

A. If there is no other ammunition in the gun, it will stay in that position. (Demonstrating.)

Q. And the record may show the position indicated is with the slide out, is that correct?

(Testimony of Ray Lester Moore.)

A. That's correct.

The Court: It is open and empty?

The Witness: Open and empty.

Q. (By Mr. Decker): And now, what would be the position the gun would be in if it were fired and there were remaining live rounds in the chamber?

A. If the gun were fired with live ammunition in the magazine, it would be in that position. It would be loaded.

The Court: And cocked?

The Witness: Ready to fire again.

Q. (By Mr. Decker): It automatically cocks itself, in other words? A. Yes.

Q. All right. How many rounds does this gun take? A. Ten.

The Court: That is the maximum?

The Witness: Maximum, yes.

Q. (By Mr. Decker): Now, Mr. Moore, how can the—you were present in court when I was demonstrating the various sounds that could be produced by the gun, were you not?

A. Yes. [73]

Q. And you heard Mrs. Harrington testify as to the sound that she heard, right?

A. I did, yes.

The Court: Well, will you stop there, Mr. Decker?

Mr. Decker: Yes.

The Court: When you made the noise by pulling

(Testimony of Ray Lester Moore.)

the trigger and having the hammer go down, did you have it in safety?

Mr. Decker: I did have it on the safe position.

The Court: And the other noise you made was with the hammer down in a safe position, is that correct?

Mr. Decker: Yes. I might illustrate that so we will be perfectly clear on it.

The Court: Now, the safety now is off? It is in the firing position?

Mr. Decker: That is right.

The Court: Now put the safety on.

Mr. Decker (Demonstrating): That is the click-noise I made. I had the gun in the safe position and I released the hammer by pulling the trigger.

The Court: Yes. Now, how did you do it with the noise that Mrs. Harrington said she did not hear?

Mr. Decker: (Demonstrating.)

The Court: That is with the safety on and with the hammer down rather than in a cocked [74] position?

Mr. Decker: Yes.

Q. Now, referring to that louder noise, Mr. Moore, how can that noise be produced without discharging the gun, with the gun fully loaded?

A. With the safety on safe position. (Demonstrating.)

Q. The gun would not fire? What other ways could it be produced under those conditions?

(Testimony of Ray Lester Moore.)

A. By pulling the safety down.

The Court: He says without firing.

The Witness: That wouldn't fire.

The Court: What?

The Witness: It could be——

The Court: Halfway?

The Witness: Yes.

The Court: You mean you could do it in one motion?

The Witness: It could be done.

The Court: I see.

Q. (By Mr. Decker): That is, instead of pulling the trigger to release the hammer, you can push the safety lever from the firing position to the safe position and this will release the hammer, but the gun will not fire?

A. Will not fire, supposedly.

The Court: Without pulling the trigger?

The Witness: Without pulling the trigger, yes.

Q. (By Mr. Decker): And then, of course, a third way would [75] be to simply fan the gun to make that noise with the gun on safe?

A. It could be.

The Court: In other words, you wouldn't pull it clear back to the cocked position?

The Witness: (Demonstrating.)

Q. (By Mr. Decker): Will you do that just once more? A. (Demonstrating.)

Q. All right, now, in either case, that is, any of those three conditions that we just described, with the gun on safe, releasing the hammer with the

(Testimony of Ray Lester Moore.)

trigger, or with the gun on the firing position and releasing the hammer by moving to the safe position, or by just fanning or pulling the hammer back partially and releasing it, with respect to any of those conditions, a snapping noise occurring as a result of any of those three, it is true, is it not, that another similar noise would not be made without cocking the gun? A. Not very well.

Q. Do you see what I am getting at? Let's assume that the gun has been clicked in any one of those three manners, a clicking noise has been produced. How, then, in order to make another clicking noise, it would be necessary to pull the hammer back, would it not? A. It would.

Q. There is no other way to do it? [76]

A. I don't think so.

The Court: Could you evict the shell and cock the gun and put a new shell in the barrel?

The Witness: You can do that by pulling the breach back——

The Court: Yes, you can pull the breech back.

The Witness: Provided the magazine was loaded.

The Court: Yes. And pump a shell out of the chamber and put one back in and the gun would be in a cocked position?

The Witness: That would leave it in a cocked position.

The Court: And ready to fire? The safety would be off?

The Witness: Yes, ready to fire.

(Testimony of Ray Lester Moore.)

Q. (By Mr. Decker): Could this be done without discharging one round?

The Court: When you say "discharging," you mean "ejecting"?

Mr. Decker: No, I mean discharging.

The Court: You mean firing?

Q. (By Mr. Decker): Will it automatically cock itself, Mr. Moore, without actually discharging one of its bullets?

The Court: Well, either say "firing" or "ejecting." I don't think "discharging" is the word you use.

Mr. Decker: All right. O.K. [77]

The Court: That is as I understand it. Isn't that correct? You either fire or eject, don't you?

The Witness: Well, by taking them out by hand, that's the way you would do it.

The Court: Yes. You can eject it by hand.

The Witness: You can eject it by hand, yes.

Q. (By Mr. Decker): And in the event you do that, will it arm itself automatically? Will the hammer be back in firing position? A. Yes.

The Court: That is a rather clumsy way to do it, though, isn't it?

The Witness: It sure is.

Q. (By Mr. Decker): You might demonstrate—well, we don't have any live rounds or any dummy rounds.

The Court: No, and I don't want any.

Mr. Decker: We don't need to demonstrate that. All right.

(Testimony of Ray Lester Moore.)

The Court: The answer to that one is "No."

Q. (By Mr. Decker): Now, if we make any of those clicking noises in the manner described, and with the safety mechanism in the safety position, we won't disturb that lever in any way, will we? The safety lever will stay on "Safe"?

A. It's on "Safe," yes.

Q. Let's assume it is on "Safe" to start with and then we [78] produce that clicking noise by pulling the trigger, at the conclusion of that operation the gun will still be on "Safe," won't it?

A. It will.

Q. And if we produce that clicking noise by releasing the hammer with our thumb, it will remain in the safe position?

A. It will.

Q. And if we produce that clicking noise by moving the safe lever from "Fire" to "Safe," this gun will still remain in the safe position; correct?

A. Right.

Q. So any of those three ways that we cause this clicking noise with the safe on will not disturb the safe, but it will remain in the "On" position, correct?

A. That's right.

Q. In other words, it is true, isn't it, Mr. Moore, that in order to put that gun in a position where, operated normally, it will fire, we have to move that safety lever from the safe position back to the firing position, is that right?

A. That's right, yes.

Q. All right. Now, I want you to assume, Mr. Moore, that the person who was handling this gun

(Testimony of Ray Lester Moore.)

was producing the clicking sound that we have been talking about, the loud noise of the hammer falling all the way to within a very short distance of the firing pin. And assume that this person, having done that [79] a few times, caused the gun to discharge, to fire. Could that have been done in any way other than by moving the safe mechanism from "Safe" to "Fire"? A. Not very well.

Q. Well, is there a possibility, no matter how remote, that the gun would fire with the safety lever in the safe position?

A. Well, they seem to at times.

Q. That is, no gun is perfect; is that what you are saying?

A. That's right. Not as long as there is ammunition.

Q. What could cause this to happen?

A. We don't know. It has been a major puzzle with all gunsmiths.

Q. Is that any more true of this particular gun than any gun? A. Not necessarily, no.

Q. What you are saying is that if the gun functions as it is designed to, functions normally, it will not fire under these conditions?

A. Well, it shouldn't fire, no, but there is a possibility.

Q. Well, what is that possibility, speaking now out of your experience with guns?

A. Well, there would be no way of knowing, but it would [80] be probably a million to one chance

(Testimony of Ray Lester Moore.)

that they would ever go off, but they have been known to do it.

Q. All right. So what you are doing now is simply indicating that there is no such thing as a safe gun; isn't that substantially what you are saying?

A. Well, yes, in a way.

Q. All right. Well, then, let's assume that this is not what happened, that this one-in-a-million thing isn't what happened. What would be required to get that safety lever off of the safe position to the firing position?

A. Well, it would be pressure, but I don't understand just what you mean.

Q. Could it have been done inadvertently?

A. That's one way of doing it, and that is why a lot of them happen, they do cock them with both hands to make a mistake, pulling mistake, yes.

Q. That is, a person using both hands might inadvertently pull the safety back at the same time he pulled the hammer back?

A. That is true. That has happened.

Q. What about the safety mechanism itself? Is it on safe when it is in that locked position there?

A. Yes.

Q. All right, now, you have moved it about a quarter of an inch back. Would the gun fire with the safety in that [81] position?

A. No.

Q. Is there a point where the gun will fire before it reaches all the way back to the firing position?

A. No, it has got to get clear—well, it might be

(Testimony of Ray Lester Moore.)

to a thousandths of an inch or something like that.

The Court: The safety works until the safety pin is clear open?

The Witness: Until the cam is moved completely out of the way, yes. Where the cam is worn, then it could. It would still fire in that position. It goes up here where it is rigid.

Q. (By Mr. Decker): I see. So, for the record, you have been able to move the safety mechanism from the firing position forward a little bit and the gun still fires? A. It would still fire.

Mr. Murray: I don't think there is any basis in the record for that.

Mr. Decker: Well, that is what he just testified to.

The Court: Well, this is his opinion now. Whether it will or won't is a matter for him—I mean an expert——

Mr. Murray: Well, I just didn't think the witness had said that.

The Witness: Well, it will fire as long as this hammer will strike the pin. [82]

The Court: Yes, but it couldn't strike the pin on this weapon if the——

The Witness (Interposing): Even in that position, with repeated clicking it might jar that off. It can't go if you cock it clear back. Now, this (demonstrating) I don't know. Sometimes they get worn, and will.

Q. (By Mr. Decker): What about in cocking the gun with just the right hand? Is it conceivable

(Testimony of Ray Lester Moore.)

that in pulling back the hammer with the right thumb the safety mechanism could be pulled back at the same time?

A. Well, it's a very high safety and it could if it slipped. I wouldn't know. It would be very hard to say. It could be done, yes, by slipping.

Q. Did you find anything wrong with the safety mechanism on this gun? A. No.

Q. You did tear it down, didn't you?

A. I did, yes.

Q. And you found nothing mechanically wrong with the gun? A. No.

Mr. Decker: I think that is all, Mr. Moore.

The Court: Then you may cross-examine, sir.

Mr. Murray: Thank you, your Honor.

The Court: If you want me to observe any motions, why, I will step over and do it and observe it if that becomes [83] necessary.

Mr. Murray: I have no questions of Mr. Moore, your Honor.

The Court: All right, Mr. Moore. That is all.

(Witness excused.)

Mr. Decker: Shall we take our recess now, your Honor?

The Court: It all depends on how far you can get. Can we conclude the direct examination of Mrs. Harrington, or at least get to the point where you could say you were practically through and just want a chance to review your notes?

Mr. Decker: I am practically there. However,

I do want her to draw a diagram for us, which she did in the deposition, to show the location of herself and her husband in the living room. I think it is probably a matter of about twenty minutes.

The Court: Why don't you do this: Have her appear here before court proceedings and put it on the board? That is, the location of the furniture and the room itself and explain it to counsel in advance so we can have as much advance notice as possible. Then if you want to put in the position of the things, she can do that on examination, by getting the basic design done and ready to go.

(Discussion between Court and counsel off the record.)

The Court: Do you think we can conclude this tomorrow? [84]

Mr. Decker: I think so, your Honor.

The Court: Are you going to have very many witnesses?

Mr. Murray: No, our case will be relatively brief.

The Court: Can you indicate about how many witnesses you expect to have?

Mr. Decker: Yes; I am going to call two officers who investigated the scene, but they will be quite short witnesses. Then I may call a doctor to testify to the alcohol blood count, which again will be quite short.

The Court: Can't that be stipulated to?

Mr. Decker: It probably can be.

Mr. Murray: Insofar as I am concerned, it can be.

Mr. Decker: Here is the problem: We have an agreement we are going to submit on the issue of cause of death, a stipulation, and that stipulation is taken from a transcript containing the report of the inquest and it includes a statement about the blood alcohol content found at the inquest—not the inquest, but the autopsy. I want to include in that stipulation such evidence as to what the significance of this finding is in terms of degree of sobriety or lack thereof.

The Court: Well, you may want to do that if you can't agree on it. Aren't there tables of standards that will show that?

Mr. Decker: That is right. I intend to pursue that with counsel. [85]

The Court: All right, try to do that. I don't know what the use of alcohol has to do with this case, if anything. But I can't prejudge that because I don't know.

All right, we will be at recess until 10:00 o'clock tomorrow morning.

(Whereupon, an adjournment was taken to tomorrow, Tuesday, March 21, 1961, at 10:00 o'clock a.m.) [86]

Tuesday, March 21, 1961—10:00 A.M.

The Clerk: Joyce A. Harrington versus New York Life Insurance Co., further court trial.

The Court: The record will show that the plain-

tiff is on the witness stand. She has heretofore been sworn and is testifying on direct examination.

Mr. Decker, are you ready to proceed with the direct examination?

Mr. Decker: Yes, your Honor.

The Court: All right, will you proceed.

JOYCE A. HARRINGTON

resumed the stand.

Direct Examination

(Continued)

By Mr. Decker:

Q. Mrs. Harrington, prior to starting out the court session you have placed upon the blackboard in the courtroom a diagram, have you not?

A. Yes.

Q. Briefly, with respect to this diagram, I gather that this is a floor plan of the main living area of your home at 716 Spruce Street, South San Francisco, is that right?

A. That is right.

Q. And you have indicated here in the lower left-handed corner an irregular shape. I gather that is the couch you [87] were referring to yesterday in your testimony?

A. Yes.

Q. And this round object in front of the couch is the coffee table that you were referring to?

A. That is right.

Q. I take it, then, that there was an open archway between the living room and the dining room; is that right?

A. Yes.

Q. And in your testimony yesterday you re-

(Testimony of Joyce Antonia Harrington.)

ferred to a television set, and that would be this object here, marked "TV," correct?

A. Yes.

Q. And what is this square object here alongside the television set?

A. That is the chair that Arnold sat on.

The Court: Do you mean the boy, Arnold?

The Witness: My son.

Q. (By Mr. Decker): That is where Arnold was seated at the time this incident took place?

The Court: Both the deceased and this boy are named Arnold?

The Witness: Yes.

The Court: He is Arnold, Jr.—or is it Junior?

The Witness: It is Junior, but I usually called my husband Harry. [88]

The Court: I know you have a distinction in your mind, but the pleadings here show they are both named Arnold.

Mr. Decker: I will refer to him as Arnold, Jr.

The Court: All right, so I can keep the distinction in my mind.

Q. (By Mr. Decker): So this point which is unmarked alongside the television set is the chair in which Arnold, Jr., was seated at the time the incident occurred? A. That is right.

Q. And he was facing, if I am correct, in the direction which this arrow indicates on the chair?

A. Yes, that is right.

Q. Then there are three "X's" marked on the diagram. I take it that the "X" I am now indicat-

(Testimony of Joyce Antonia Harrington.)

ing as "X-1" is the place where Mr. Harrington was seated at the time he was cleaning the gun with the chamois cloth, as you testified? A. Yes.

Q. And the point which I am now marking as "X-2" is the place where you were sitting at the time the incident occurred?

A. That is right.

Q. And the other "X," which I am now marking as "X-3," I take it, is the point where Mr. Harrington was standing at the time he asked you—well, immediately before the incident occurred?

A. Yes. [89]

Q. And following the incident he fell at Point X-3 on the diagram? A. That's right.

Q. At any time that evening up to the time the incident occurred, Mrs. Harrington, according to your observation, was Mr. Harrington intoxicated?

A. No.

The Court: You say "at any time"?

Mr. Decker: At any time.

Q. I think, as we concluded your testimony yesterday, Mrs. Harrington, you had indicated that following your second request to Mr. Harrington to not click the gun any more, you had looked away? A. Yes.

Q. And then you heard him say something to the effect that—and this is the testimony that was objected to and has not been ruled upon yet, and I take it there is an objection to it?

Mr. Murray: Yes, the same objection.

(Testimony of Joyce Antonia Harrington.)

Mr. Decker: I was just trying to pick up the threads.

Mr. Murray: And I take it our objection is still good?

The Court: Yes, the ruling will run to the testimony, so you may proceed.

Mr. Decker: All right, sir.

Q. You heard him say, after looking away, something to the effect that "there is nothing to be nervous about. The gun is [90] on safe. Look, I will show you." That is substantially what you testified to?

A. Yes, it is.

Q. Did you then look as he requested?

A. Yes, I did look.

Q. And what did you see?

A. I saw that the gun was pointed towards his temple.

Q. And what happened then?

A. And it went off.

Q. You were looking at him when this happened?

A. Yes.

Q. The gun was in his right hand?

A. Yes.

Q. What was the appearance on his face when the gun went off?

Mr. Murray: Your Honor, I think this question is going to call for hearsay testimony and a conclusion of the witness, in addition, and I must object on those grounds.

The Court: Well, this is one of those really shadowy areas.

(Testimony of Joyce Antonia Harrington.)

Mr. Decker: Your Honor, in the case of *Holland v. Zollner*, 102 Cal. 633, 36 Pacific Reporter 930, the following question was held to be proper: "What was the appearance of this man at that time with reference to his being rational or [91] irrational?"

The Court: As I say, this is a somewhat shadowy area. It is my view that the question could be answered by conclusions or could be answered factually. In other words——

Mr. Murray: Well, I am content to await your Honor's ruling until after the question is answered, with the understanding, of course, that my objection runs.

The Court: I am inclined to let her answer it in her own words, and I would say to you, Mrs. Harrington, as nearly as you can, would you tell us what he looked like in terms of facial expression rather than in your conclusion as to what frame of mind the expression conveyed to you, if this is possible? This is a very difficult thing in both semantics and expression. Of course, I know you have a foreign language background. You speak English rather well, but you still have to search for a word from time to time, I imagine, in expressing your thoughts in English, so I don't expect you to do this to perfection, but do it to the best of your ability.

Now, do you understand the distinction I am trying to make?

The Witness: Yes, sir.

(Testimony of Joyce Antonia Harrington.)

The Court: All right. Would you answer the question, please?

A. I remember very markedly that he looked at me with great surprise upon his face, and he threw up his hands as he fell. [92]

Mr. Murray: Your Honor, I think this is exactly the problem I had in mind. I believe this is clearly a conclusion. Mr. Harrington was obviously in a state of great shock. A bullet had just passed through his brain. I don't believe that the witness is in any position to evaluate——

The Court (Interposing): She saw it while it occurred. She could see change of expression. The real problem here is for her to describe what she did see.

Mr. Decker: There is plenty of authority on this, your Honor.

The Court: I am inclined to think——

Mr. Decker (Continuing): She can describe what she saw in terms which, it is true, can be called a conclusion; but, on the other hand, it is the best way a lay person can indicate what the fact was, instead of saying that his eyebrows were raised or his pupils were dilated or something of that kind.

The Court: I will make the record clear and I will give you a clear-cut ruling. I will overrule the objection and let the answer stand.

Q. (By Mr. Decker): Now, at the time this happened Arnold, Jr., was sitting there in his chair, wasn't he? A. Yes.

Q. And all the other children were in bed?

(Testimony of Joyce Antonia Harrington.)

A. They were.

Q. What did you do when this happened? [93]

The Court: Now, is this of any moment in this case, what happened afterwards?

Mr. Decker: I submit that it is, your Honor. I think that in order for you to make a finding of fact as to what this man's state of mind was at the time this occurred, and according to my theory of the case, this is the essential issue, according to the way I read the authorities, this is an accident within the meaning of the policy if Mr. Harrington at the time he performed this act did not anticipate or foresee or intend that injury would result from the act itself. Now, in order to make that determination, because we have no direct evidence of what his state of mind was, we have to refer to the circumstances.

The Court: Yes, but now this act has been completed. He can now have no intention whatsoever, and the only purpose for which this testimony could be used by any stretch of the imagination is that, would his prior intention have been foreseen in view of the circumstances that occurred afterwards?

Mr. Decker: That's right. For instance, it seems to me that your Honor might draw an inference that Mr. Harrington took his own life, as opposed to this being an accident, depending upon the reaction of Mrs. Harrington to this incident, and the reaction of other people who came to the scene immediately thereafter.

I grant you, sir, that this is what we might call,

(Testimony of Joyce Antonia Harrington.)

in an [94] ordinary case, remote; but it seems that all of the circumstances that occurred that evening, both before and following the incident, are relevant to this issue of the state of mind of the deceased at the time he performed the act. And this, of course, is the theory upon which I proceed.

The Court: Well, all I will say to you is that I will permit the testimony, but I am going to ask for ultimate facts—that is, mainly where certain things were, where people were, where they went, and what they did within a limited period of time.

Mr. Decker: That is precisely what I plan to do, your Honor.

The Court: All right. I don't want conversations. It seems to me that conversations by third persons will violate the hearsay rule.

Mr. Decker: We will cross that bridge when we get to it, your Honor.

The Court: All right.

Q. (By Mr. Decker): Now, Mrs. Harrington, then, very briefly, and in order to expedite this, is it true that thereafter you called the police?

A. I gathered the children into the room first, because they were coming out when they heard the noise, and then I called the police.

The Court: When you say "the children," you mean all of [95] the children?

The Witness: Yes. They heard the noise.

The Court: Yes. I am talking about Arnold, Jr. Did you send him away, too?

The Witness: Yes.

(Testimony of Joyce Antonia Harrington.)

The Court: You sent him into the bedroom?

The Witness: Yes.

Q. (By Mr. Decker): And about how long was it before anybody arrived at the scene?

A. I don't know.

Q. Well, I would appreciate it if you could give us some estimate. Was it more than an hour?

A. No.

Q. Was it more than half an hour?

A. No. After I called the police, I think they arrived in ten minutes or so.

The Court: This is the South San Francisco police?

The Witness: Yes, your Honor.

Q. (By Mr. Decker): You think it was about ten minutes or so that you waited there for the police to arrive? A. Yes.

Q. All right. During this time the children were in the bedroom? A. Yes.

Q. Where were you when the police came? [96]

A. I think I was in the door or—I don't quite remember.

Q. You mean the front door? A. Yes.

Q. All right. And did one or more than one officer come initially?

A. I remember seeing only one.

Q. I take it he pulled up in a car in front of your house and came to the door?

A. I just saw him running.

Q. He did come into the house? A. Yes.

Q. All right. And did you see the gun, which is

(Testimony of Joyce Antonia Harrington.)

Plaintiff's Exhibit 1 in evidence, at any time following the incident which you have related?

A. I did not.

Q. Did you yourself or anybody else in your presence handle the gun? A. No.

Q. Did an ambulance come?

A. Yes, it did.

Q. And this was what? Shortly after the police arrived?

A. There I have no recollection of time.

Q. All right. What was done with the children that evening?

A. I also called my neighbor to help me and I believe that [97] she had taken them to her house.

The Court: You mean your children?

The Witness: Yes.

Q. (By Mr. Decker): You went to the hospital, Kaiser Hospital in South San Francisco, is that right? A. That's right.

Q. Now, Mrs. Harrington, after this incident occurred did you have a conversation with a representative of the insurance company, Mr. Burgess, of South San Francisco?

A. On the same night?

Q. No, just afterwards.

A. Yes, I did. He came to see me, yes.

Mr. Decker: Could I see those documents we were looking at earlier, counsel, please? Thank you very much.

Q. I want to show you this photostatic copy of a document entitled, "Proofs of Death, Claimant's

(Testimony of Joyce Antonia Harrington.)

Statement," submitted to the New York Life Insurance Co., consisting of three pages, and purportedly showing your signature on Page 1, and ask you if that is your signature.

A. That is my signature.

Q. Do you recall signing that document?

A. Yes, I do.

Q. And was that document filled out, that is, the typewritten portion, completed by you?

A. You mean did I type it? [98]

Q. Yes. A. No, I did not.

Q. Do you know who did? A. No, I don't.

Q. What were the circumstances under which you signed this document, very briefly?

A. I was just told that he was going to help me.

Q. Did Mr. Burgess come to your house?

A. Yes, and it was amid very many confusions, because there were very many people there, and I was very grateful that he was going to help me.

Q. So you signed this document? A. Yes.

Q. What else did you do at that time, if you recall? What about the contracts of insurance?

A. Oh, I gave them all to him.

Mr. Decker: I would like to offer this as Plaintiff's next in order, if the Court please. And I would like to call the Court's attention to the "Received" stamp on the document which reads as follows: "Received C.S.O.—San Francisco, February 16, 1960, New York Life Insurance Co."

The Court: Do you have any objection to its admissibility?

(Testimony of Joyce Antonia Harrington.)

Mr. Murray: Your Honor, I have no objection to the admissibility of the paper insofar as it goes to show submission [99] of her proof of claim. I do, of course, object to her statement as to the cause of death upon the proof of claim, but I take it that the document is not admissible for that purpose.

The Court: You mean the statement itself?

Mr. Murray: Yes. It is shown as "accidental shooting," your Honor.

The Court: Well, that is her claim and that is all it is.

Mr. Murray: Yes. I take it that the piece of paper is not admissible as proof of the fact that death was by accidental shooting, and we would object to it on that ground.

The Court: Are you offering it for that purpose?

Mr. Decker: No, your Honor.

The Court: I don't think it's admissible for that purpose.

Mr. Murray: I just wanted the record clear on that point, your Honor.

The Court: It is admissible that she claimed it was an accidental shooting, if that has anything to do with this case. It will be admitted into evidence as Plaintiff's Exhibit 2.

(Claimant's Statement was received in evidence and marked Plaintiff's Exhibit No. 2.)

The Court: It is a photostatic copy and you have no objection to its form, I take it? [100]

(Testimony of Joyce Antonia Harrington.)

Mr. Murray: No, your Honor.

Mr. Decker: While we are getting this documentary evidence in, counsel and I have agreed that as to the contracts of insurance themselves, your Honor, the original of one of them which has been in the possession of counsel for defendant, and a conformed copy of the other original, may be submitted to the Court.

The Court: And admitted into evidence?

Mr. Decker: As evidence of the contracts themselves.

The Court: Is this satisfactory with you, Mr. Murray?

Mr. Murray: Yes, your Honor. We have only the original of one of the contracts.

The Court: Well, the conformed copy is satisfactory to both parties?

Mr. Murray: Yes, your Honor.

The Court: Then do you want them admitted as one exhibit or as two exhibits?

Mr. Decker: I think one would be preferable.

The Court: Does it have the same clause insofar as accidental death is concerned?

Mr. Decker: The crucial language is the same. They vary a little bit in other details.

The Court: Well, are the other details going to be involved in this matter?

Mr. Murray: I think not, your Honor. [101]

The Court: Then they will be admitted into evidence, both policies, as Plaintiff's Exhibit 3.

(Testimony of Joyce Antonia Harrington.)

(Policies were received in evidence and marked Plaintiff's Exhibit No. 3.)

Q. (By Mr. Decker): Mrs. Harrington, following the turning over of the contracts of insurance to Mr. Burgess and also the signing of the proofs of death form, which is Plaintiff's Exhibit 2 in evidence, did you receive a letter from the New York Life Insurance Co.? A. I did not.

Q. Did you correspond with the company? Did you write or was there any contact between you and the New York Life Insurance Co. following that?

A. Only through Mr. Burgess, and after I asked him for the rest of the insurance he told me that I was not entitled to it, and he said he would try to get it for me, and I waited for about a month or so and I wrote to them.

The Court: You wrote to the insurance company?

The Witness: To the insurance company. And they replied, saying that I was not entitled to it.

The Court: You mean they said you were not entitled to the——

The Witness (Interposing): The double indemnity portion.

The Court: ——the double indemnity. [102]

Q. (By Mr. Decker): You did receive the face value of the policy, \$15,000 and some odd, didn't you? A. Yes.

Q. And you told me you have, you think, that

(Testimony of Joyce Antonia Harrington.)

letter at home? You will try to produce it for the Court?

The Court: Oh, well, there is no necessity for that, is there? The company denies that it is liable and isn't that enough?

Mr. Decker: Well, I am thinking—well, it may well be, your Honor. I am thinking of the subsidiary problem of the interest. There is a provision in the Insurance Code, if the Court please——

The Court: Oh, this is another matter. I wasn't thinking of the insurance question. If you think this is material on that point, why——

Mr. Decker: I think it may well be.

The Court: Is there going to be any argument as to the written record, Mr. Murray? This letter was a letter sent to her denying liability on the double indemnity portion of the policy?

Mr. Murray: I believe there was, your Honor. I am not certain now. I can check and find out.

The Court: Can't we get the exact dates if this becomes a material point——

Mr. Murray: Of course. [103]

The Court: ——and stipulate to it?

Mr. Decker: Yes.

Mr. Murray: Fine, your Honor.

The Court: Because, as I take it, there is no question so far as the company is concerned but what it has always denied liability for double indemnity.

Mr. Murray: I think that is true.

The Court: I don't know when this letter would

(Testimony of Joyce Antonia Harrington.)

have been written, but at the time it was written—would you try to find out when that is?

Mr. Murray: Yes, your Honor.

The Court: What was that agent's name, again?

The Witness: Burgess. L. Burgess.

Mr. Decker: B-u-r-g-e-s-s I think is the right spelling, your Honor.

The Court: Now I want to be sure about this: At first he told you that you could not recover for the double indemnity? He told you that and then you wrote to the company?

The Witness: Yes, sir.

Q. (By Mr. Decker): And you received a reply from the company confirming this so far as they were concerned? A. Yes, that is right.

Q. Now, Mrs. Harrington, I may have asked you some of these questions at the outset of the direct examination yesterday, and if I did, and if the Court so recalls, I will withdraw [104] these questions. I can't remember at this point exactly what I did ask you.

But let me ask you now: So far as you were able to observe, and now I am only asking for your observation of Mr. Harrington, was he addicted to the use of alcohol or drugs? A. No.

Q. Had he ever threatened to take his own life?

A. No, never.

Q. Had he ever, so far as you know, attempted to take his life in the past? A. No.

Q. Had he ever inflicted violence upon you?

A. No.

(Testimony of Joyce Antonia Harrington.)

Q. Did he leave any kind of a, what is commonly called a suicide note? A. No.

Q. How would you characterize your marriage to Mr. Harrington?

A. We loved each other very deeply and we were happy.

Q. Do you know of any reason why your husband might have wanted to take his own life?

A. No, I do not.

Mr. Decker: I think that is all.

Now, your Honor, it is getting along in the morning and I anticipate that Mrs. Harrington's cross-examination will be [105] quite lengthy. I have two officers from the South San Francisco Police Department here whom I would like to put on out of order.

The Court: Is there any objection?

Mr. Murray: Your Honor, I have no objection at all to calling the officers out of order. I don't think Mrs. Harrington's cross-examination will be "quite lengthy," but, on the other hand, the officers are here.

The Court: Well, we will attempt to accommodate the officers. Mrs. Harrington, would you step down, then, temporarily, and we will hear the officers, and your cross-examination may follow?

Mr. Decker: Officer Swinfard, would you step forward, please?

JAMES F. SWINFARD

called as a witness by the plaintiff, being first duly sworn, testified as follows:

The Clerk: Please state your name for the Court.

The Witness: James Franklin Swinfard.

The Clerk: How do you spell your last name?

The Witness: S-w-i-n-f-a-r-d.

Direct Examination

By Mr. Decker:

Q. Mr. Swinfard, you are a police officer employed by the Police Department of South San Francisco, are you? [106] A. Right. Yes, sir.

Q. And you were on duty, were you, on February 5, 1960? A. Yes, sir.

Q. Did you receive a call—or let me put it this way: How did the incident which Mrs. Harrington has been testifying about here come to your attention?

A. I was dispatched by our office via radio.

Q. That is, you were alone, were you, in your radio car that evening?

A. At the exact time I was directing traffic for a fire, standing near the car, and I heard the radio and proceeded alone.

Q. All right. Where was the location of the fire? Where were you?

A. I was at the corner of Grand Avenue and Maple in South San Francisco.

Q. How long did it take you to get to the Harrington home?

(Testimony of James F. Swinfard.)

A. A maximum of five minutes.

Q. You were unaccompanied? You were by yourself at that time? A. I was.

Q. Mr. Swinfard, where did you bring your patrol car to a stop?

A. I believe it was in front of the house next door to Mrs. Harrington's home. [107]

Q. I see. Did you have a record of exactly what time you received that call and your time of arrival at the house?

A. If I may refresh my recollection, sir?

Q. You may.

The Court: You may.

A. At 10:32 p.m. I was dispatched to the scene, sir, on the 5th of February.

Q. (By Mr. Decker): And it is your best estimate it was five minutes, give or take a minute or so, when you arrived at the Spruce Street address?

A. Yes, that is correct.

Q. Now, when you arrived there did you see Mrs. Harrington right away? A. Yes, sir.

Q. Where was she?

A. She was outside her home.

Q. How was she dressed?

A. I believe she had on a robe, a dressing robe.

Q. All right. Then what did you do? Just describe what you did when you got out of your car.

A. I got out of the car and asked her what had happened.

Q. And this happened as soon as you got out of your automobile which was parked there in front

(Testimony of James F. Swinfard.)

of the neighbor's house? A. Yes, sir.

Q. What did she say? [108]

Mr. Murray: Your Honor, I am afraid I will have to object to that question. I think it calls for clear hearsay on the part of Mrs. Harrington.

Mr. Decker: Now, your Honor, I ask this question recognizing that there is a hearsay problem, but upon the basis that anything that Mrs. Harrington had to say to Officer Swinfard within a matter of a very few minutes after this incident occurred is a statement made under conditions of stress and excitement and, obviously, I think, falls within the spontaneous declaration exception to the hearsay rule.

The Court: This is one of the matters that are mentioned in the—I think it is 1870 of the Code of Civil Procedure, and is sometimes called part of the *res gestae* rule.

Mr. Decker: Yes.

Mr. Murray: Yes, your Honor. May I be heard on that?

The Court: Yes.

Mr. Murray: I think the theory of the *res gestae*, and I expect Mr. Decker would agree, or the spontaneous declaration rule, is that the witness under the immediate impetus of whatever has happened speaks, the accident speaks, so to speak.

The Court: Yes.

Mr. Murray: Now, the courts have uniformly held, I believe, that when an appreciable period of time has elapsed, [109] enough so that the witness

(Testimony of James F. Swinfard.)

is speaking consciously himself with consideration of what has happened, or the possibility of that, that it does not fall within the *res gestae*.

Now, in this particular situation we don't know how much time has passed since Mr. Harrington had fired the shot, but we do know that it was at least ten minutes. Mrs. Harrington has testified that it took the police about ten minutes to get there. She has also testified that she didn't call the police right away. She put the children into the bedroom. We don't know how long that took.

Now, she had time to put the children in the room, call the police, time for the police dispatcher to call Officer Swinfard, and time for Officer Swinfard to get into his car and arrive at the scene. I don't believe this comes within the *res gestae* rule, your Honor.

Mr. Decker: She testified they arrived within approximately ten minutes from the time she called them.

Mr. Murray: From the time she called them.

The Court: Well, there isn't much quarrel about the facts here, Mr. Decker. What Mr. Murray has stated is very consistent with what you have stated and with what the witness testified, so the question is not what occurred, but is what occurred within the so-called spontaneous declaration rule or the *res gestae* rule under the circumstances.

It seems to me this is a matter that has to be decided [110] from the circumstances themselves. It would seem to me that some latitude should be

(Testimony of James F. Swinfard.)

allowed, and it becomes a matter of degree. Now, I have had this case, and I have had these questions many times in accident cases, railroad accidents, where the railroad employees are talking to one another right after the accident has occurred, and it may take the conductor three or four or five minutes to walk from his end of the train and to get up to the engineer, and he says, "What happened?" And the engineer then says thus and so. I admit those as *res gestae*, because under those circumstances the conversation couldn't have occurred before, and the parties who are involved in it are the men who have been operating the equipment. So as to the time involved in these matters, I have always taken the position that it depends upon what kind of a situation occurred.

Mr. Murray: I think perhaps we have one additional factor here, your Honor. Mrs. Harrington called the police in order to report what happened, and this was her purpose in calling them, of course, and also to get an ambulance for Mr. Harrington, naturally. I think this is significant.

The Court: I think where there has been a homicide of some kind, a death of some kind, I think it's a perfectly natural thing. In fact, if I may be a little corny about it, the thesis of the rule is "Doin' what comes naturally." That is just the basis behind it. Because it is the natural [111] thing to do, the probabilities favor its truth.

Mr. Murray: I suppose that is true, your Honor. But I think your Honor agrees also that what is

(Testimony of James F. Swinfard.)

called the guarantee of trustworthiness in this type of situation is that the speaking of the witness is close enough to the scene so that you can be sure they are dominated by what has happened.

The Court: Oh, I recognize that and it becomes a matter of degree. I understand your position, and I will overrule the objection on the ground that I think this is still within the period of time when a person is speaking under the stress of the occurrence, and therefore this is not a planned and deliberate type of thing, although I admit this is getting into the exterior limits. But I have to exercise my judgment, so I will overrule the objection on that theory.

Mr. Murray: All right, your Honor.

The Court: Now, the question was, you asked her what happened, and what did she say to you.

The Witness: May I refer to my notes?

The Court: Yes, certainly. And if you desire to see the notes, Mr. Murray, you may certainly examine them.

Mr. Murray: Thank you, your Honor.

The Witness: Mrs. Harrington said, "My husband just shot himself, but he didn't mean it."

Mr. Murray: Your Honor, I think the testimony of Officer Swinfard has just demonstrated my position on the *res gestae* [112] point. But it also raises another point, which is that Mrs. Harrington's statement that her husband didn't mean to shoot himself, I suppose is a conclusion of the purest sort. Therefore I move to strike it on that ground.

(Testimony of James F. Swinfard.)

Mr. Decker: It seems to me the statement is admissible on the spontaneous declaration basis of its not being hearsay. And then with respect to its being an opinion or conclusion, it is admissible insofar as it shows the state of mind of the declarant at that time. It is not offered for the purpose of proving the fact asserted, but it is offered for the purpose of showing what Mrs. Harrington's state of mind was at that time.

The Court: I smile because I have been arguing with myself about what "state of mind" means in this situation, and I am in the middle of reviewing the authorities. I don't want to appear to be facetious about this thing, but you put your finger on what is a rather difficult subject at the moment.

I think what I must do now is to overrule the objection and leave the testimony subject to a motion to strike. I want to parse this question about "but he didn't mean it" aspect, as to whether that is a conclusion which is not admissible, Mr. Murray, and so I will leave the motion to strike standing on the same ground, and if we have to examine the matter further I will ask for authorities on it.

Frankly, I am inclined to agree with Mr. Decker, and [113] under the broad rule of admissibility under Rule 44, I think it may fall within one of the exceptions. But I will overrule the objection and leave the motion to strike on the same grounds on which the objection has been offered, and if you have any additional grounds to offer, you may do so.

Mr. Murray: In all fairness to your Honor, I

(Testimony of James F. Swinfard.)

think I should say that I don't see any basis or any reason why Mrs. Harrington's state of mind is at all relevant at this point.

The Court: That may well be. I don't know. That is just one of the things I will have to ascertain.

Mr. Murray: And your Honor understands my objection runs to both grounds of hearsay, and opinion and conclusion and hearsay?

The Court: Yes.

Mr. Murray: Thank you.

Q. (By Mr. Decker): You went into the house then, Officer Swinfard? A. Yes, sir.

Q. And if you will look over your right shoulder there you will see a diagram which Mrs. Harrington has made of the house. So you will get the proper orientation, this is the front door.

A. Yes, sir.

Q. Now, referring to that diagram, tell us where you found the decedent, Mr. Harrington. [114]

A. Mr. Harrington was on the living room floor. The position of this diagram will be between "X-3" and the word "living."

Q. A position on this diagram between "X-3" and the word "living"? A. Yes, sir.

Mr. Decker: We will designate this as X-4. Would that be appropriate, your Honor?

The Court: Yes.

Q. (By Mr. Decker): Now, did you see Plaintiff's Exhibit 1?

The Court: The gun.

(Testimony of James F. Swinfard.)

A. Yes, sir.

Q. (By Mr. Decker): And where was it with reference to the diagram, again?

A. It was near the coffee table, between the coffee table and Position X-3 on this diagram, on the floor.

Mr. Decker: All right. I think we can make that X-5. Between the coffee table and X-4?

A. X-3.

Q. In this position? (Drawing on diagram.)

A. Yes.

Q. Now, Officer Swinfard, did you handle the gun at all? A. Yes, sir.

Q. I take it, then, that when you picked it up you observed its condition? [115]

A. Yes, sir.

Q. Was it cocked or uncocked?

A. I am not familiar with the weapon, sir. I can say that the hammer was back.

Q. The hammer was back?

A. I don't know whether it is cocked or uncocked in that position.

Q. The hammer was in that position (demonstrating)? A. Yes, sir.

Q. All right. Did you examine the gun?

A. Yes.

Q. Was it loaded or unloaded?

A. It was loaded, sir.

Q. And I take it there was one shell which had been used?

(Testimony of James F. Swinfard.)

A. We found evidence of one shell being expended, sir.

Q. The magazine was—I mean, was the magazine fully loaded except for that one shell?

A. I don't know, sir. It had nine rounds in the weapon.

Q. There were nine live rounds in the weapon?

A. Yes, sir.

Q. Officer Swinfard, where was the wound in the decedent's head?

A. There was actually two wounds. One was on the right side of his head and one on the left side of his head.

The Court: When you say the side, you mean in the area [116] of the temple?

A. Yes. On the right side in the area of the temple. On the left side it was slightly behind and above the left ear.

Q. (By Mr. Decker): Were you able to—well, withdraw that. Did you arrange for—well, withdraw that. Did an ambulance come while you were there? A. Yes.

Q. And the body was removed, or the decedent was removed? A. Yes, sir.

Q. I take it you left the scene thereafter?

A. After completing my investigation, sir.

Mr. Decker: I have no further questions.

The Court: You may cross-examine, Mr. Murray.

Mr. Murray: Thank you, your Honor.

(Testimony of James F. Swinfard.)

Cross-Examination

By Mr. Murray:

Q. Officer Swinfard, after you had arrived at the scene did you subsequently call other officers to come and assist you? A. Yes.

Q. Who were those officers?

A. Officer Tognetti, Officer Casey and Officer Adams.

Q. Will you give me those names again?

A. Officer Tognetti, T-o-g-n-e-t-t-i, and Officer Casey, David Casey, and Officer James [117] Adams.

Q. Now, you testified as to the location of some of the various objects in the room, Officer Swinfard. Did you make measurements to determine where those objects were located?

A. Yes, sir, I did, sir.

Q. Did you make any diagrams?

A. Yes, sir.

Q. Do you have those diagrams with you?

A. Yes, sir.

Q. May I see them, please?

Mr. Murray: I ask that these diagrams be marked in evidence as, I suppose, Defendant's Exhibits A-1 through -4, for identification.

The Court: Defendant's Exhibits A-1, -2, -3 and -4. There are four sheets?

Mr. Murray: Yes, there are four sheets, each showing a different perspective.

(Testimony of James F. Swinfard.)

The Court: Then they may be marked Exhibits A-1, -2, -3 and -4 for identification.

There is no objection to their going in evidence?

Mr. Murray: They will be identified later. Is there any objection?

Mr. Decker: There may be after I look at them.

Mr. Murray: I hadn't intended to offer them until the officer testified.

The Court: I understand that, but I was trying to [118] hurry it a little bit. You want them marked for identification at the moment?

Mr. Decker: I would prefer that at this point.

The Court: All right, they will be marked for identification first.

(Diagrams referred to were marked Defendant's Exhibits Nos. A-1, -2, -3, -4 for identification.)

Q. (By Mr. Murray): Officer, I wonder if you would please tell us very briefly what these sketches show, these Defendant's Exhibits A-1, A-2, A-3 and A-4?

The Court: Will you refer to them as A-1 for identification and so on?

The Witness: Yes.

The Court: Now, what is A-1?

The Witness: Diagram A-1 is a floor plan of a living room looking from the ceiling down. The top of the diagram would be in a westerly direction.

Q. (By Mr. Murray): And Diagram A-2?

(Testimony of James F. Swinfard.)

A. A-2 is a——

Q. (Interposing): You say the top of the diagram would be in a westerly direction?

A. Yes.

Q. I wonder if you could mark that at the top. And Diagram A-2 was what?

A. Diagram A-2 is a plan of the ceiling looking from what [119] would be the attic down. Again the top of the diagram is in a westerly direction.

The Court: You say it's a plan of the ceiling?

The Witness: Yes, sir.

Q. (By Mr. Murray): And A-3?

A. Diagram A-3 is the north wall of the living room.

Q. A side view of the north wall?

A. Yes, standing in the living room looking north, this would be the wall. And Diagram A-4 is standing in the living room, the east wall.

Q. A side view of the east wall?

A. Yes, sir.

Q. And, Officer Swinfard, do these sketches accurately portray the objects as you found them on the evening when you were called to the scene?

A. Yes, sir.

Mr. Murray: Your Honor, I would like to offer these diagrams in evidence at this time.

Mr. Decker: No objection, your Honor.

The Court: They will be admitted into evidence in accordance with the numbers with which they have been marked for identification.

(Testimony of James F. Swinfard.)

(Defendant's Exhibits A-1 through A-4 were received in evidence.)

Mr. Murray: Your Honor, at my request the South San [120] Francisco Police Department made a few Thermofax copies of Exhibit A-1. I am going to ask Officer Swinfard some questions about the diagrams, and Mr. Decker has no objection. Perhaps it will be helpful to your Honor to have this diagram before you. (Handing exhibit to the Court.)

The Court: All right.

Mr. Decker: I wonder if before we start it wouldn't be helpful for the officer to indicate on the diagram on the board the directions he has referred to so that they will coincide with the directions indicated in the exhibit?

The Witness: May I have my diagram to compare them?

Mr. Murray: Yes.

The Court: Well, I think it is pretty apparent, Mr. Decker. There may be some differences here as to what Mrs. Harrington has put on the board, but, generally speaking, I can match them up.

Mr. Decker: Yes, I can see that. I was only referring to the fact that for the first time the officer injected the descriptive device of directions into the record. We haven't had that before and I thought we might relate it to the diagram in order to clarify it.

The Court: Either his directions are right or

(Testimony of James F. Swinfard.)

wrong in terms of north and south; is that what you are talking about?

Mr. Decker: Yes.

The Court: East and west? [121]

Mr. Decker: Yes.

The Court: As I get it, he says the top of the diagram, just like the top of the diagram on the board, would be west.

Mr. Murray: Your Honor, I have no objection to any of this procedure, but I don't think the directions are important in the case.

The Court: No, I don't, either.

Mr. Decker: The top of the diagram——

The Court: Toward the top of the board is west?

Mr. Decker: ——is west.

The Court: Just the same as toward the top of the diagram on the paper is west. Isn't that correct, Officer?

The Witness: Yes.

Mr. Decker: Fine. Thank you.

The Court: Proceed, Mr. Murray.

Q. (By Mr. Murray): Officer Swinfard, directing your attention for a moment to Diagram A-1, the view of the scene of the room looking down, does the sketch or the diagram show the position of Mr. Harrington? A. Yes, it does.

Q. And is he indicated by the figure?

A. Yes, sir.

Q. And does the diagram show the couch?

A. Yes, sir. It's in the lower left-hand corner.

(Testimony of James F. Swinfard.)

Q. And it is this bent structure, the curved structure? [122] A. Yes.

Q. And does the diagram show the coffee table?

A. Yes, sir, directly in front of the couch.

Q. What does the word "highball" indicate?

A. There was a glass container on the table that contained a liquid substance that smelled like a highball.

Q. What do the words "cocktail sauce" indicate?

A. There was another glass container on the table that contained a red substance that appeared to be a tomato sauce or cocktail sauce.

Q. Does the sketch show the position of the gun?

The Court: That is not an alcoholic cocktail?

The Witness: Yes, sir.

Q. (By Mr. Murray): A shrimp cocktail?

A. Yes.

Q. Does it show——

A. (Interposing): The position of the gun is indicated next to the words "cocktail sauce."

Q. It looks like a little gun drawn on the floor there. A. Yes.

Q. By the way, you have indicated measurements on the diagram between the various objects?

A. Yes, sir.

Q. How did you arrive at these measurements?

A. These were taken with a fifty-foot steel tape. [123]

Q. And you recorded the measurements in your book? A. Yes, sir.

(Testimony of James F. Swinfard.)

Q. Does the sketch show the position of the spent cartridge?

A. Yes, sir. It is indicated by a little dot on the opposite arm of the couch near the measurement 13 feet 8 inches on the left-hand side of the diagram.

Q. I see. You have a little rectangle noted there and then a little dot, and that is the position of the spent cartridge?

A. Yes, sir.

Q. Does this diagram show the position of the exit of the bullet from the room?

A. No, sir, this diagram does not.

Q. Does another diagram show it?

A. Diagram A-2 shows it.

Q. Diagram A-2? It shows the position from which the bullet exited from the room?

A. Yes, sir, that's right.

The Court: It went through the ceiling, did it?

The Witness: Yes, your Honor.

Q. (By Mr. Murray): Did you ever recover the bullet, Officer?

A. No, sir, we never did.

Q. Where did it go?

A. Sergeant Biancinni went to the—— [124]

Q. What was that name?

A. Sergeant Biancinni, B-i-a-n-c-i-n-n-i. He went to the Harrington resident next day in an attempt to recover the projectile and found that it had gone through the ceiling of the living room and through the roof of the house and was lost.

Q. Officer Swinfard, did you take any photo-

(Testimony of James F. Swinfard.)

graphs of the scene as it was at the time? Did you take any photographs?

A. Yes, there were photographs taken.

Q. Do you have those photographs with you?

A. Yes, sir.

The Court: Do they have any particular order?

Mr. Murray: Yes, sir. The only order I have in mind is that I would like this particular photograph first. I ask that these photographs be marked.

The Court: They will be a B series. How many are there?

Mr. Murray: There are five.

The Court: Defendant's Exhibits B-1 through B-5.

(Photographs marked Defendant's Exhibits B-1 through B-5, inclusive, for identification.)

The Court: Is there going to be any objection to the photographs?

Mr. Decker: No, your Honor.

The Court: They will be admitted into evidence and you can identify them with the witness. [125]

Mr. Murray: Thank you, your Honor.

(Defendant's Exhibits B-1 through B-5 were thereupon received in evidence.)

Q. (By Mr. Murray): Directing your attention to Defendant's Exhibit B-1 for identification, what does this photograph show?

A. It shows the apartment, the coffee table and two glass containers and the couch.

(Testimony of James F. Swinfard.)

Q. And directing your attention to photograph B-2, what does that show?

A. This shows just about the same thing. It shows drapes in the background on the back wall, and the arm of the couch where the spent cartridge is lying can be seen in this photograph.

Q. And Exhibit B-3? What does that show?

A. This shows the weapon and the coffee table and the fireplace. It is just from a different angle.

Q. And Defendant's Exhibit B-4?

A. This shows part of the coffee table, the weapon, and the fireplace. It is taken from a different angle.

Q. And Defendant's Exhibit B-5?

A. This shows where Mr. Harrington's head was, the dark stairway area, and in the background is the weapon and the coffee table.

Q. Officer Swinfard, do these photographs accurately present the scene as you saw it that [126] evening?

A. Yes, they do.

Q. How long after—had the body been removed by the time these pictures were taken?

A. Yes, sir.

Q. In other words, this occurred some time after the occurrence and during the course of the investigation following the occurrence?

A. Yes, sir.

Q. Other than the removal of Mr. Harrington's body, though, I take it everything was as it was when you found it?

A. Yes, sir, it was.

Q. Once again directing your attention to De-

(Testimony of James F. Swinfard.)

fendant's Exhibit B-1, Officer Swinfard, this shows the gun, does it not? A. Yes, it does.

Q. And it shows the highball glass and the cocktail glass? A. Yes.

Q. And this was as the gun was, in that position, when you found it, as shown in this picture?

A. That's correct.

Mr. Murray: We are through with these for the moment, your Honor, if you would care to look at them.

The Court: Thank you. Nobody has asked you, and I don't know whether Mr. Murray intends to ask you, but when you examined the gun did you notice the position in which the safety of the gun was? [127]

The Witness: Yes, sir, the safety was in the back position.

The Court: That is, in the position of firing?

The Witness: I am not sure, sir.

The Court: You don't know which it is? In the down position——

The Witness (Interposing): Pulled back as the hammer was.

The Court: Show him the weapon.

Mr. Murray: Yes, your Honor.

The Witness: That is how the weapon was when we found it.

Mr. Murray: Let the record show the safety is in "fire" position——

The Court: Yes.

(Testimony of James F. Swinfard.)

Mr. Murray: And the hammer is fully drawn back.

The Court: Yes. Thank you.

Q. (By Mr. Murray): Officer Swinfard, did I request the Police Department to make an enlargement of Defendant's Exhibit B-1?

A. Yes, sir, you did.

Mr. Murray: May this enlargement be marked? Would you prefer to have it in the same series, your Honor?

The Court: This is an enlargement of Exhibit B-1, is it? [128]

Mr. Murray: Yes.

The Court: Let's call it B-6, then.

(Enlargement of B-1 was received in evidence and marked Defendant's Exhibit B-6.)

Q. (By Mr. Murray): Just a moment ago I asked you if I asked the Police Department to make an enlargement. Is this the enlargement?

A. Yes, sir, it is.

Q. Does it accurately portray the scene as you remember it on that evening? A. Yes, sir.

Mr. Murray: I would like to offer this enlargement in evidence as Defendant's Exhibit B-6.)

Mr. Decker: No objection.

The Court: If it hasn't already been admitted, it will be. It is in evidence.

Mr. Murray: Does your Honor care to see the enlargement?

(Testimony of James F. Swinfard.)

The Court: Hand it to my court clerk. And the safety side is down in that picture?

The Witness: Yes, sir, that is correct.

Q. (By Mr. Murray): Officer Swinfard, I would like to ask you just a few questions about the gun which you found upon the scene. What was the serial number of the gun?

A. The serial number was 844557. [129]

Mr. Decker: I hope that is the number on Exhibit No. 1.

Mr. Murray: It is my understanding that it will be, Mr. Decker.

Q. Does this appear to be the gun?

A. Yes, sir, this is the gun.

Q. You have described the condition of the gun when you found it and we have just been through that, and I believe you told us that you did unload the gun; is that right? A. Yes.

Q. And you found nine bullets in the gun?

A. Yes.

Q. Nine live rounds? A. That's right.

Q. And was one live round in the chamber, do you recall?

A. I can't—I'm not that familiar with the weapon. I couldn't say.

Q. And you found one spent cartridge?

A. Yes.

Q. Which would indicate the gun had at one time had ten rounds?

A. It would indicate that the gun had been discharged.

(Testimony of James F. Swinfard.)

Q. Now, what did you do with the gun, the expended shell and the nine bullets?

A. These were all taken to the station and tagged as evidence. [130]

Q. And were they kept at the station?

A. Until the time of the inquest.

Q. And then you gave them to the coroner?

A. Yes.

Q. Did the police test the gun in any way?

A. No, sir.

Q. Did the police do anything with the gun which might affect the mechanical condition?

A. No, sir.

Mr. Murray: That's all I have, your Honor.

The Court: Redirect examination.

Redirect Examination

By Mr. Decker:

Q. Officer Swinfard, have you had occasion to investigate homicides before?

A. I have investigated some homicides, yes.

Q. And as a result of your investigation of this case, did you formulate an opinion as to whether or not this was a suicide or an accident?

Mr. Murray: Your Honor, I am afraid the question calls for not only——

The Court (Interposing): Yes, sustain the objection.

Mr. Decker: That's all. Thank you, Officer.

The Court: That is all.

(Witness excused.) [131]

The Court: Do you have another witness or is this all?

Mr. Decker: Yes, we have Officer Tognetti here. I don't think he will take nearly as long as Officer Swinfard.

The Court: Well, in any event, we will stay until he is through. I am not going to make him wait over until this afternoon. Put him on and we will continue until he is finished.

Mr. Decker: Fine. That is what I had in mind.

PAUL A. TOGNETTI

called as a witness by the plaintiff, being first duly sworn, testified as follows:

The Clerk: Please state your full name to the Court.

The Witness: Paul Albert Tognetti.

Direct Examination

By Mr. Decker:

Q. Officer Tognetti, you are, as Mr. Swinfard, a police officer employed by the South San Francisco Police Department, are you not?

A. Yes.

Q. And you also were called to 716 Spruce Street, San Francisco, on the evening of February 5, 1960?

A. Correction: It is South San Francisco.

Q. Did you go there in the company of some other officers? A. Yes, sir.

Q. Who was that? [132]

(Testimony of Paul A. Tognetti.)

A. I believe the sergeant.

Q. What is his name?

A. (Unintelligible to the reporter.)

Q. And when you arrived there were there other officers present? A. Yes, there were.

Q. Who were they?

A. I believe it was Officer Swinfard, Casey and Adams.

Q. I see. Was Mrs. Harrington present when you arrived at the scene?

A. I don't recall whether she was or not.

Q. How about the children?

A. I think the children had left. They were over at the neighbor's house.

Q. They were at the neighbor's house by this time? And Mr. Harrington, the deceased, was he still there?

A. I believe I arrived as the ambulance had taken off. I could hear the ambulance taking off.

Q. It is your recollection that the ambulance was just leaving when you arrived? A. Yes, sir.

Q. Mr. Tognetti, would you describe briefly for us the appearance of the home as you observed it when you went in to make your investigation?

A. It was very much like Officer Swinfard described it, and [133] I did notice the pool of blood the victim had lost.

Q. And what did you observe about the degree of order or disorder in the house itself?

A. The house appeared to be very well kept, very neat.

(Testimony of Paul A. Tognetti.)

Q. You saw no indication that there had been a struggle or anything of that kind in the living room? A. No, sir.

Q. Did you see a gun collection in the house?

A. Yes, sir.

Q. Where was that?

A. I believe it was in the living room on the far wall.

Q. How many guns were there?

A. Oh, let's see. I don't recall exactly. I think there was, oh, four or five rifles and a few revolvers.

Q. Mounted on the wall?

A. Yes, in a case.

Q. I see. A. A collection.

Q. What about radio equipment? Did you observe any radio equipment in the house?

A. Yes, he had some sort of a ham station.

Q. Where was that located?

A. I can't recall.

Q. You remember seeing it?

A. I remember seeing it, yes, and I remember seeing this [134] great big antenna on the outside of the home also.

Q. I see. Did you observe the glass with what Officer Swinfard referred to as a highball?

A. Yes, sir.

Q. Am I correct in my understanding that there were just the glass, maybe half full of liquid, on the coffee table?

(Testimony of Paul A. Tognetti.)

A. It was just as the officer had described it, as far as I can recall.

Q. And this is all you saw in the way of what looked like what may be a drink around the living room?

A. Yes, sir.

Q. What was your job, so far as the investigation was concerned? What did you do?

A. Usually we worked as a team. We assist each other, and more or less we have occasion to work on similar incidents in the past and usually we——

Like this particular case, Officer Swinfard arrived there at the scene first and he made the measurements and everything else, and I sort of got cued in because I had arrived there late, and I had to find out what was going on, and there was another officer there assisting with the measurements and everything else, and I assisted for a few minutes and then discussed if there were any other persons for statements, and everything else, and it was stated that the boy was in the room and I said, "Fine. You take care of this situation and I [135] will take care of the statements," and I immediately left the scene to go to the neighbor's house to talk to the boy.

Q. You questioned Arnold, Jr., at the neighbor's house?

A. Yes.

Q. Took a written statement from him, did you?

A. Yes, sir.

Q. And what else did you do?

A. I took the statement of the boy, and we usually like to get all the statements of anybody

(Testimony of Paul A. Tognetti.)

that has any bearing on the case as soon as possible. It's a known fact that when they are mostly upset and everything else, the truth is mostly apt to be there, and if you wait a day or two later they might have time to prepare a story.

Q. Yes?

A. So with that intent in mind, to get the statements, to get the truth of what actually happened, I went over to the neighbor's house and interrogated the boy.

Q. Yes?

A. And I believe he had just gone to bed, but it hadn't been too long, and I discussed the situation with him, and at the time he did not believe his father was dead.

Mr. Murray: Your Honor, just a moment——

Mr. Decker: Yes, just let me——

The Court: That part of it may go out. Now, what is the purpose of this? [136]

Mr. Decker: First of all, the answer isn't responsive. I just asked him what he did.

Q. I take it you went next door and you took a statement from Arnold, Jr.? A. Yes, I did.

Q. And after you had completed getting the statement from him did you get another statement or do any more work?

A. I went back to the scene, and later on I (unintelligible) took the statement of the wife at the hospital.

Q. You took a statement from Mrs. Harrington

(Testimony of Paul A. Tognetti.)

at Kaiser Hospital in South San Francisco, is that right? A. Yes.

Q. And that concluded your investigating work that evening? A. Yes.

Q. Now, Officer, do you have with you the written statements that you took from Arnold, Jr., and from Mrs. Harrington? A. Yes, I do.

Q. What did Arnold, Jr., tell you?

Mr. Murray: Your Honor——

The Court (Interposing): Do you want to object to that, Mr. Murray?

Mr. Murray: Well, your Honor, I think we have the statements here.

The Court: Well, I want to get more basic. Do you have an objection to the statements going in evidence? [137]

Mr. Murray: Just a moment, your Honor. Let me look at them and then I will let you know.

The Court: Surely. Because if the argument is about which is the best evidence, then I think the statements themselves, rather than the testimony of this witness as to what was said; but if the argument is whether or not the statements themselves are admissible, either as reported orally or as written, then I want to hear the argument on that.

Mr. Murray: Your Honor, I think that when offered by Mr. Decker, that it is clear that the statements are not admissible under the hearsay rule. However, in cases of this sort, in a trial by the Court, I have no desire to conceal from your Honor the facts of the case.

(Testimony of Paul A. Tognetti.)

The Court: Oh, it isn't a question of concealment from me. I am not concerned about that, and I don't think there is any——

Mr. Murray (Interposing): I am particularly concerned about portions of Mrs. Harrington's statement. Might I suggest that the statements be identified——

The Court (Interposing): Oh, they can be marked for identification, certainly.

Mr. Murray: ——and that at the time they are offered——

The Court: But I think we are running into hearsay statements that are now getting a little remote. The boy's might come close enough, but you have Mrs. Harrington's [138] statements immediately following, or upon the arrival of the first officer, and now you are getting into a period of time when she has had an opportunity to become conditioned by talking to a number of people, and I think a statement taken at the hospital would be highly objectionable because of the passage of time, and, therefore, I would be inclined to rule, Mr. Decker, that the statement of Mrs. Harrington is not admissible.

Now, then, I am even a little dubious about the boy's statement, but if it will eliminate the necessity of bringing the boy here, why, I will take his statement because I don't want him in the courtroom any longer than he has to be.

Mr. Murray: That is what I had in mind, your Honor.

(Testimony of Paul A. Tognetti.)

Mr. Decker: Let me suggest that—well, first, I will defer to your Honor's ruling with respect to Mrs. Harrington's statement.

The Court: Yes. Well, I think it is in the questionable area where I would rule unfavorably to you or against your desire to offer it, just as your statement insofar as Officer Swinfard was concerned, which was in a rather questionable area but on which I would rule in your favor.

Mr. Decker: I understand perfectly, your Honor.

The Court: The line of demarcation, I think, is crossed here, so I would rule that way. But as to the boy, I am not prepared to say that this is not a declaration that was made as [139] a part of the **occurrence**. But let's put it this way: If it can substitute for his appearance and there is no objection, I think I can consider it because there is nothing constitutional about it. You gentlemen can stipulate it can be admitted into evidence.

Mr. Decker: Let me suggest that, in order to avoid the necessity of having Arnold, Jr., testify in court about this incident, that this statement be admitted into evidence pursuant to stipulation of counsel and that also his deposition which was taken be placed in evidence by stipulation.

The Court: Any objection, Mr. Murray?

Mr. Murray: I think, your Honor, I would be in favor of such a stipulation, but, if it please the Court, I would like to think about it over the lunch hour.

The Court: You may do so. Now, how about the

(Testimony of Paul A. Tognetti.)

statement insofar as the officer is concerned, because I don't want to hold the officer here?

Mr. Murray: I think, your Honor, we should identify both statements at this time so that we have them here.

The Court: All right. We will mark Arnold, Jr.'s, statement as Plaintiff's Exhibit 4. It will be marked for identification as Plaintiff's Exhibit 4.

(Statement of Arnold, Jr., was marked Plaintiff's Exhibit No. 4 for identification.)

The Court: And the statement of Mrs. Harrington will [140] be marked Plaintiff's 5 for identification.

(Statement of Mrs. Harrington was marked Plaintiff's Exhibit No. 5 for identification.)

The Court: Now may I ask you, Officer Tognetti, in this statement taken by the boy, is this in your handwriting?

The Witness: Yes, your Honor.

The Court: In other words, you questioned him, he gave you answers and you wrote down what he had said in narrative form?

The Witness: Yes, sir.

The Court: Did he then read it himself or did you read it back to him?

The Witness: I read it back to him.

The Court: Did he sign it?

The Witness: Yes, he did.

The Court: Did he make any corrections in the statement?

(Testimony of Paul A. Tognetti.)

The Witness: No. I believe I read it back several times to make sure that he fully understood what he was signing.

The Court: He was an eleven-year-old boy?

The Witness: I believe he was twelve at that time.

The Court: Did he appear——

The Witness: He appeared a very intelligent boy for that age. A very, very intelligent boy for that age.

Q. (By Mr. Decker): And you have been referring in your responses to his Honor's questions to this written statement [141] which I am showing you now, which is marked Plaintiff's Exhibit 4?

A. That's right. Correct.

Mr. Decker: Thank you. I have no further questions of Mr. Tognetti.

The Court: Any cross-examination?

Mr. Murray: I think this will be very brief, your Honor.

Cross-Examination

By Mr. Murray:

Q. Officer, you have told us the circumstances under which you took a statement from Arnold Harrington, Jr. Were the circumstances of taking Mrs. Harrington's statement similar?

Mr. Decker: Just a minute. I am going to object to this as being outside the scope of the direct examination. Your Honor has ruled with respect to her statement and I have deferred to your

(Testimony of Paul A. Tognetti.)

Honor's ruling. The statement will not be in evidence.

The Court: All right. It has been identified, but it is not in evidence, if you have offered it in evidence.

Mr. Murray: Your Honor, I believe the statement has been identified.

The Court: It has been identified, but it is not in evidence, and I don't intend to admit it in evidence unless you stipulate. [142]

Mr. Murray: Your Honor, I think portions of the statement are admissible in evidence and portions are not. At this time I just wanted to establish——

The Court: You mean is it admissible in evidence as——

Mr. Murray: As admissions.

The Court: As admissions. Well, I will overrule the objection. He can do this on direct, anyway, and I am not going to require this officer to be trotting back and forth here, so you can proceed to lay the foundation.

Q. (By Mr. Murray): Tell the circumstances under which you took Mrs. Harrington's statement.

A. It was taken at Kaiser Hospital in the waiting room.

Q. And she told you the story, is that right?

A. Well, I questioned her first and then she made these statements afterwards.

Q. And the statement, is it in your handwriting or hers? A. Yes, it is.

(Testimony of Paul A. Tognetti.)

Q. In yours or hers?

A. I believe it is in mine.

Q. And she signed it? A. Yes.

The Court: If the officer wants to examine the statement, he may.

A. I have to look at it. It is a question of time. Right, it was in my handwriting and she signed it. [143]

Q. (By Mr. Murray): Did she read the statement before she signed it? A. Yes, she did.

The Court: Let me be clear on this. Did you read it to her or did she take it and read it?

The Witness: I read it and I handed it to her.

The Court: And did she read it again?

The Witness: She read it again and signed it.

The Court: Did she make any corrections?

The Witness: No, I don't remember any corrections.

The Court: In taking this statement, was there any discussion, insofar as Mrs. Harrington was concerned, about whether this was free and voluntary, or was she advised as to any rights she might have not to make a statement, or was the subject even discussed?

The Witness: Well, we usually discuss that we like to have a statement if we may in order to clarify or make our records more complete.

The Court: This is the way you put it to her?

The Witness: That is the way we usually like to have the statement—"if you wish, if we may, and your signature, if you please," words to that effect,

(Testimony of Paul A. Tognetti.)

and most cases, if they do deny, we don't put any pressure on them either way.

Mr. Murray: That is all I have, your Honor.

The Court: Do you have any further redirect examination? [144]

Mr. Decker: No, I haven't, your Honor.

Mr. Murray: Your Honor, I would like to say one thing. There is some slight possibility, I would suppose, that we might want to recall Officers Swinfard and Tognetti should the time come to present our case.

The Court: That's up to you. Do you have them under subpoena?

Mr. Murray: I have Officer Swinfard under subpoena, your Honor. I don't have Officer Tognetti under subpoena.

The Court: Do you want them ordered to remain this afternoon?

Mr. Murray: No, your Honor. I was going to suggest that I would like you to order them to if we communicate with them by telephone and ask them to return, that they should.

The Court: Well, can you do that? I don't want to keep these men waiting and away from their jobs any longer than we have to.

Mr. Murray: I understand. That is why I suggest they go now.

The Court: Well, I will leave it on that basis, Officer.

The Witness: We would appreciate sufficient time ahead of time.

(Testimony of Paul A. Tognetti.)

The Court: I understand. If this occurs, you may face a delay until tomorrow, or something like that, but we [145] will leave it that way.

Mr. Murray: Thank you, your Honor.

The Court: That is just a calculated risk you will have to take.

Mr. Murray: Yes, sir.

The Court: You are excused, then, and if we need you further, why, counsel will have to try to contact you by telephone.

The Witness: Your Honor, I assume that—these are the only records for our personal file. I assume that after the trial is over we would like to have them back.

The Court: Yes. Is there anything other than the statements here?

Mr. Decker: The photographs and the diagram.

(Simultaneous colloquy between Court and counsel.)

The Court: It is all right to excise the portions that haven't been identified?

The Witness: What isn't needed in evidence we would like to have because as of the moment we have nothing in our files.

The Court: Can you gentlemen agree? It appears that there are only two pieces of paper here that are involved, is that right?

Mr. Decker: I think they should be removed and left here and the other returned to the officer. [146]

The Court: All right, separate them and turn

(Testimony of Paul A. Tognetti.)

back the others to the officers. Those are the officers' reports. Then when the matter is concluded, the other papers, the photographs, the diagram and the statements will be directed to be returned to the——

Mr. Decker: South San Francisco Police Department.

The Court: Well, I will return them to counsel with directions that they be returned.

Mr. Decker: All right.

(Witness excused.)

The Court: Now, then, Mr. Decker, other than the cross-examination and redirect examination of Mrs. Harrington, do you have any other evidence in this case?

Mr. Decker: I think not, your Honor.

The Court: Then your case should be concluded some time this afternoon?

Mr. Decker: Yes, sir.

The Court: Mr. Murray, I am trying to ascertain the length of time, because Mr. Decker believes on the conclusion of the testimony of Mrs. Harrington the case of the plaintiff will be rested and then it will be up to the defendant to go ahead.

Do you have any evidence to present or will you have any evidence to present? If so, will you be ready to go forward this afternoon? [147]

Mr. Murray: Yes to both questions, and I think it will be relatively brief.

The Court: Would it be advisable to recess until 1:30 so we won't be under any real time pressure.

or can we do it in the time left if we recess until 2:00 o'clock?

Mr. Murray: I think it might be best under the circumstances to recess until 2:00 o'clock, from the standpoint of my witnesses.

The Court: All right, then, we will recess until 2:00 o'clock.

(Whereupon, a recess was taken to 2:00 o'clock p.m.) [148]

Afternoon Session, 2:00 P.M.

JOYCE A. HARRINGTON

resumed the stand; previously sworn.

The Court: The record will show that the plaintiff, Mrs. Joyce Harrington, is on the stand for cross-examination. You may cross-examine.

Mr. Murray: Before proceeding, your Honor, I think there was a question left open this morning about whether Arnold, Jr.'s, statement and the deposition would be admissible, and I have thought about that, and I think in order to obviate the necessity of having the boy here, I would stipulate to the admissibility of both of those documents.

The Court: Is that agreeable to you?

Mr. Decker: That stipulation is accepted, your Honor.

The Court: All right, then, Exhibit 4 will be admitted into evidence on stipulation.

(Plaintiff's Exhibit No. 4, previously marked for identification, was received in evidence on stipulation.)

(Testimony of Joyce Antonia Harrington.)

The Court: Do you want the transcript of the deposition to be marked as an exhibit?

Mr. Murray: I think perhaps that might be best, your Honor.

The Court: This is the original?

Mr. Murray: Yes. [149]

The Court: Then it will be admitted into evidence as—well, do you want it as a defense exhibit or a plaintiff's exhibit? The plaintiff offered it originally. I think it makes no difference.

Mr. Murray: No, your Honor.

The Court: Then it will be Plaintiff's Exhibit 6 and will be admitted into evidence.

(Deposition of Arnold, Jr., was received in evidence and marked Plaintiff's Exhibit No. 6.)

Cross-Examination

By Mr. Murray:

Q. Mrs. Harrington, I am going to have to ask you a few questions this afternoon. I realize that this will be painful for you and I will try to be as brief as possible.

I think it might be helpful, Mrs. Harrington, if we could have just a bit more information about Mr. Harrington's hobby of collecting guns. Let me ask you just a few questions about that.

How long had guns been a hobby with Mr. Harrington, if you recall?

A. Ever since he was a child. I think.

Q. He had been firing guns since then?

(Testimony of Joyce Antonia Harrington.)

A. Yes. He had hunted squirrels and things in Iowa, as he told me before.

Q. How long had he been collecting guns as a hobby? [150]

A. Before we went to Panama, which was in 1950, I believe he had two, and he started then, I think. I am not very sure because I was never interested in it.

Q. At least it has been for some time?

A. Yes.

Q. Do you recall, Mrs. Harrington, how many guns Mr. Harrington had and of what type?

A. I don't know the total amount, but I can tell you the names of some of them.

Q. Well, let's start with, first, did he have some rifles? A. He had five rifles, I think.

Q. Of various types? A. Yes.

Q. And then I take it he had some hand guns?

A. Yes, he does. I mean he did.

Q. And what were the types of those?

A. He had a pair of Colts, a Unique French gun, a .32, a Browning, and a little small Colt—I don't know what it is called. He had a Standard King, or something like that, .22.

Q. A target gun, I suppose?

A. I suppose so. I don't know.

Q. Oh, I think that is sufficient, Mrs. Harrington. Now, where did Mr. Harrington buy his guns?

A. To the best of my knowledge, he bought them from Bob Chow's Hobby and Gun Shop. [151]

Q. It's a gun shop run by Mr. Chow?

(Testimony of Joyce Antonia Harrington.)

A. Yes.

Q. Now, I think you have told us that Mr. Harrington shot his guns at the rifle range once or perhaps twice a week? A. Yes.

Q. And that was at Sharps Park, as I understand? A. Yes.

Q. And that Arnold accompanied him to the range. Was Mr. Harrington a good shot, Mrs. Harrington? A. Very good.

Q. Did he belong to any shooting club?

A. Only the South San Francisco Rod and Gun Club.

Q. And you have testified, I think, that he was quite familiar with his guns? A. Yes.

Q. Where did Mr. Harrington keep his guns in the home?

A. The rifles were on the rack and the small wapons were in a box.

Q. And the rack was where?

A. In the hallway.

Q. Was that, looking at the diagram now——

A. Off the living room.

Q. Off the living room? A. Yes.

Q. Somewhere in this area that I am indicating? [152] A. Yes.

Q. I am indicating the wall between the dining room and the hallway. In this area here?

A. That is right.

Q. And you say the hand guns were kept elsewhere? A. In the box.

Q. And where was the box kept?

(Testimony of Joyce Antonia Harrington.)

A. In a closet in our bedroom.

Q. And where did Mr. Harrington keep his ammunition?

A. Downstairs in the basement on a high shelf.

Q. Did anyone else in the house besides Mr. Harrington handle the guns in the home?

A. No.

Q. You didn't? A. No.

Q. And Arnold, Jr., didn't?

A. No, only when he allowed him to when they went hunting.

Q. When they went hunting? A. Yes.

Q. But in the house itself no one else did?

A. No.

Q. Did Mr. Harrington get out the guns frequently at home?

A. Yes, he would clean them.

Q. Did he ever play with the guns around the house?

A. What do you mean by "play"? [153]

Q. Well, for example, did he ever wear them around in a gun belt or anything of that nature?

A. I remember seeing him once only doing that.

Q. I think you have told us already you were apprehensive about the guns. Did you ever warn Mr. Harrington about the guns?

A. Each time he got them out to clean I always said to be careful with them, as a precautionary measure.

Q. Mrs. Harrington——

(Testimony of Joyce Antonia Harrington.)

The Court: May I interrupt? Did you ever object to having the guns in the house at all?

The Witness: No, not really.

The Court: When you say "not really," was there ever a discussion between you and Mr. Harrington as to whether you should have any weapons in the house at all?

The Witness: Well, no, I did not object to that.

The Court: Did you ever complain to him that the children might get hold of them and accidentally injure themselves or someone else?

The Witness: No.

The Court: You may proceed.

Mr. Murray: Thank you, your Honor.

Q. Did Mr. Harrington have any problems with his health, Mrs. Harrington?

A. No. All except, I think I said he had an ulcer. [154]

Q. He had an ulcer? A. Yes.

Q. And how long had he had the ulcer?

A. I don't quite know. I think he started with a nervous stomach or something, described it that way.

The Court: In respect to the ulcer, was it one which he was treating at the time this incident occurred or was it in a controlled condition at that time?

The Witness: At that time it had been almost cured, I would say.

The Court: Was he on a special diet?

The Witness: No.

(Testimony of Joyce Antonia Harrington.)

The Court: Was he taking any medication for it?

The Witness: Only when it bothered him.

The Court: Was he under the treatment of a doctor?

The Witness: No.

The Court: Had he been under treatment by a doctor about the condition at some time during his lifetime before this incident?

The Witness: Yes, two years before.

The Court: And the ulcer had been of at least two years' duration before the incident occurred?

The Witness: Yes.

The Court: So that it was in a relatively controlled condition at the time the incident [155] occurred?

The Witness: Yes. He had gained weight and he was feeling much better than he had ever felt.

The Court: Had he been having any symptoms from his ulcer just prior to the time this incident occurred, such as pains or——

The Witness: No. Occasionally when he ate the wrong combination of foods I think it would bother him, as it would bother me.

The Court: Well, but did he, just prior to the time this incident occurred, make any complaints about his ulcer or his stomach?

The Witness: Not that I remember.

The Court: If you have any questions in the light of the questions the Court asked, you may certainly explore it.

(Testimony of Joyce Antonia Harrington.)

Mr. Murray: Thank you, your Honor. I think your Honor has explored the situation.

Q. Mrs. Harrington, on the 5th of February, you have told us, I believe, that Mr. Harrington had been home from work with a reaction to a flu shot? A. Yes.

Q. And that you and your friend had gone to Chinatown, and that because you overstayed, Mr. Harrington had become angry—somewhat angry with you? A. Yes.

Q. Was there any other reason why Mr. Harrington was [156] upset?

A. No, that was the only reason, outside of the fact that he had prepared supper for me as a surprise and I wasn't there to eat it.

Q. Mrs. Harrington, had you been planning to go to the 1960 Olympics? A. Yes.

Q. When did you plan to leave?

A. I went to the tryouts in 1959, and because I was chosen to go to the tryouts I was automatically chosen to go to the 1960 Olympics.

Q. When would you have left, if you had gone?

A. About the 14th of February.

Q. Was Mr. Harrington upset about this?

A. No. He encouraged me very much, in fact.

Q. Who was to look after the children while you were gone?

A. He would because he was going to take two weeks off during the time I was gone.

The Court: Which Olympics were you going to? The Winter Olympics?

(Testimony of Joyce Antonia Harrington.)

The Witness: Yes.

The Court: At Squaw Valley?

The Witness: Yes.

The Court: That is not the Summer Olympics in Rome?

The Witness: No. [157]

The Court: You are talking about the Winter Olympics?

The Witness: That is right.

The Court: The Court can take judicial knowledge that Squaw Valley is in the mountains of California.

Mr. Murray: Yes, your Honor, that is right.

The Court: It is not a great journey from your home in South San Francisco, whereas going to Rome, Italy, for the track and field and other competitions would have been a much longer trip.

Q. (By Mr. Murray): Mrs. Harrington, I am going to have to ask you just a few questions about the tragic events themselves. Again, I will try to be brief.

Now, on this evening, prior to the time that Mr. Harrington injured himself, you have told us, I believe, that you were seated on the couch and that Arnold was in the chair, as you have indicated, between the dining room and the living room?

A. Yes.

Q. Now, as I understand it, the quarrel was continuing, at least as far as Mr. Harrington was concerned?

A. Yes.

Q. But you would not respond?

(Testimony of Joyce Antonia Harrington.)

A. That is correct.

Q. Then Mr. Harrington was seated on the couch in the place you have indicated? [158]

A. Yes.

Q. And then, I take it, he got up to get the Mauser automatic? A. Yes.

Q. Do you know how long he was gone?

A. No, I don't, because I was watching television while this was going on.

Q. Where did he go to get the gun, do you know? A. In the bedroom.

Q. And upon his return, what did he do?

A. I think he was just cleaning it, polishing it.

Q. With the chamois that you have told us about? A. Yes.

The Court: May I ask a question here about this Mauser pistol?

Mr. Murray: Of course, your Honor.

The Court: Was this Mauser pistol one of his collection, and was it used for any other purpose than just a part of a collection?

The Witness: It was only used as part of his collection and it was the most recently acquired gun.

The Court: Did he use it for safety purposes in addition to having it as part of the collection? In other words, did he have it as a weapon around the house that he would use to protect the household in the event an incident [159] occurred?

A. No, because he had remarked on how well the gun was put together, and that they didn't use any

(Testimony of Joyce Antonia Harrington.)

screws, or some kind of device to hold it together. It was fitted.

The Court: Yes. But I mean, did he have a gun around that he kept in a stand beside the bed, or something that he would use as a defensive weapon around the house?

The Witness: Yes.

The Court: What gun was that?

The Witness: That was the French gun, the Unique.

The Court: He kept it rather than the Mauser for defensive purposes?

The Witness: That's right.

The Court: And the Mauser was just a part of his collection which he used and which he shot from time to time in target practice or when he was engaged in rod and gun activities?

The Witness: I don't know whether he had ever shot that one.

Q. (By Mr. Murray): Then I think you told us that Mr. Harrington stood up with the gun.

A. You mean after he left the house and came back?

Q. No, I am talking now about the moment immediately before he injured himself, before the incident.

A. Yes, he stood up. [160]

Q. Then you saw him stand up, did you?

A. Yes.

Q. What did he do then? Did he move in front of you?

A. Yes. He was talking to me, and so he moved

(Testimony of Joyce Antonia Harrington.)

from his seat and he just walked around and stood in front of me.

Q. To the place you have indicated there?

A. Yes.

Q. In which hand was he holding the gun?

A. I believe it was in his right hand.

Q. And then you testified that he commenced making the clicking noise with the gun. Now, did he make this noise with the right hand?

A. I wasn't—I wasn't looking at him. If you remember, I wouldn't look at him because I was angry, and so I couldn't tell you. I assume it was with the right hand.

Q. Well, Mrs. Harrington, perhaps you just don't remember at this time. I think that when we discussed this question during your deposition you indicated that the clicking was being produced with only the right hand.

The Court: That is what she says she thinks now, but she says she isn't sure. But you can certainly question her about what she said.

Q. (By Mr. Murray): I would just like to show you this place in your deposition, Mrs. Harrington, and I would like to read it to you: [161]

“Question”——

Mr. Decker: What page, counsel?

Mr. Murray: This is on page 45. I am sorry, Mr. Decker.

“Q. Was the clicking being produced with only the right hand? A. Yes.

(Testimony of Joyce Antonia Harrington.)

“Q. The left hand was not assisting in producing the clicking? A. No, I don’t think so.”

The Court: Do you remember making those answers to those questions at the time the deposition was taken, Mrs. Harrington?

The Witness: I suppose I must have done it. But I know now that—at the time you took the deposition I had never been through anything like that and I was very apprehensive, but when I look back upon it now, I didn’t look at him because I was angry with him and he could have. I don’t remember.

The Court: But the best recollection you have now and the impression you have is that he was using his right hand rather than both hands?

The Witness: I am not going to say that I know for sure.

The Court: Well, I am not asking if you know for sure, [162] I am asking if it is your impression.

The Witness: Yes, it is my impression.

The Court: Now I would like to ask you how big a man was Mr. Harrington. What was the height and weight and physical appearance of Mr. Harrington?

The Witness: He was five feet eleven and he weighed—he was rather slight for his height, and so he weighed about 145 to 150.

The Court: His hands and feet, were they large or small?

The Witness: No, he was a perfect standard, I will say.

(Testimony of Joyce Antonia Harrington.)

The Court: Well, he had the hands of a professional man and not the hands of a working man?

The Witness: No.

The Court: You mean he had the hands of a professional man?

The Witness: Yes.

The Court: He wasn't a horny-handed man like a pick-and-shovel man, was he?

The Witness: No, his hands were very smooth.

The Court: That is all I have at present.

Mr. Murray: Thank you, your Honor.

Q. Mrs. Harrington, how rapidly was this clicking taking place? [163]

A. It went—I think I indicated to you before.

Q. Yes, I believe you did. I wonder if you could just do it now for the Court.

A. Yes, sir. It went one-two-three-four-five——

Q. I think perhaps you indicated it was going a little bit more rapidly than that during your deposition. Perhaps you can't recall?

A. I can't recall.

The Court: I might interpose that I think that might vary from time to time. I don't know how accurate a person can be on that, Mr. Murray. That is a pretty hard memory test.

Mr. Murray: It is, I am sure, your Honor.

The Court: What you are trying to convey to us is that it was fairly rapid; is that the idea? I don't mean just bing-bing-bing, like that.

The Witness: No. It was continuous, I would say.

(Testimony of Joyce Antonia Harrington.)

The Court: Yes. That is what I meant by fairly rapidly.

Q. (By Mr. Murray): Well, during your deposition, Mrs. Harrington, we concluded, I guess, that it was about twice a second. Would you say that's an accurate statement?

A. Well, to tell the truth, I don't know exactly how twice a second would sound.

Q. You do recall this discussion in your deposition? [164]

A. Yes, I remember your asking me how fast he was going.

Q. Mrs. Harrington, how was this clicking being produced?

A. I don't know. What do you mean?

Q. Well, as far as the gun is concerned.

A. I don't know.

Q. How was the mechanism of the gun being manipulated to produce the clicking?

A. I don't know, I am sorry.

The Court: All you have a recollection of is the kind of sound you heard?

The Witness: That is right.

The Court: You don't know how he was producing it?

The Witness: No.

Q. (By Mr. Murray): While the clicking was going on, Mrs. Harrington, where was the gun pointed? A. I assume at the ceiling.

The Court: You say you assume that?

(Testimony of Joyce Antonia Harrington.)

The Witness: Yes. I didn't look at him so I don't know.

Q. (By Mr. Murray): Mrs. Harrington, I realize it has been a long time since this happened, and again perhaps some of it doesn't come back quite as well as it might. I think when we took your deposition we discussed this point and at that time you told us the gun was pointed at the floor while he was clicking it. [165]

Mr. Murray: Mr. Decker, this is on Page 40.

Mr. Decker: Thank you.

Q. (By Mr. Murray): Starting at the top of the page, Mrs. Harrington, the deposition reads:

"Q. When you first noticed him standing there with the gun, what was he doing at the time?

"A. I suppose he was clicking it.

"Q. Where was the gun pointed then?

"A. On the floor."

A. That was when he was standing, but not when he was sitting.

Q. That is what we are talking about now, Mrs. Harrington, when he was standing. A. I see.

The Court: When he was standing there clicking the gun, he had it pointed at the floor?

The Witness: Yes.

The Court: But you don't know where he was pointing it when he was sitting?

The Witness: No.

Q. (By Mr. Murray): Well, now I am talking about when he was standing there, Mrs. Harrington, in front of you.

(Testimony of Joyce Antonia Harrington.)

The Court: You understand the question? She said that he was pointing it at the floor.

Mr. Murray: Yes, I understood the answer, your Honor. [166]

The Court: Now, is there any conflict in that testimony?

Mr. Murray: No, not at all, your Honor.

Q. So you were observing him when he was standing there with the gun?

A. I only glanced at him.

Q. And do you know how the clicking was being produced at that time?

A. No, I don't, because I purposely averted my eyes. It's something I don't like, I just—well——

Q. Now, later, I believe you told us, he pointed the gun at his head.

A. Yes, when he said, "I will prove it to you."

Mr. Murray: Your Honor, I am afraid I will have to move to strike that last portion of the answer as nonresponsive.

The Court: I am afraid that I have to say that it is responsive in time.

Mr. Murray: I asked her if he pointed the gun to his head——

The Court: Yes.

Mr. Murray: ——and the answer to that would have been yes.

The Court: All right, I will grant the motion because it is in evidence already. That is, it is being considered. [167] It is subject to an objection already.

(Testimony of Joyce Antonia Harrington.)

All right. I will strike that portion of the answer without, however, affecting the question of admissibility as to when it was offered at other times. But for this answer, and for the purpose of this answer, I will strike it.

Mr. Murray: Thank you.

Q. Now, did you see him point the gun at his head, Mrs. Harrington?

A. I think he had told me that, yes.

Mr. Murray: I take it the same ruling applies?

The Court: Yes.

Mr. Murray: Fine.

The Court: The answer is, you saw him put the gun to his head?

The Witness: But that is why I looked at him, because he said that.

The Court: Well, yes, but the point is, and the only question that has been asked is did you see him.

The Witness: Yes.

The Court: You said yes, and that is the end of it. Yes or no. It doesn't require further explanation. You have already explained.

The Witness: I see.

Q. (By Mr. Murray): Did you see him, Mrs. Harrington, adjust the mechanism of the gun in any way before pointing it [168] to his head?

A. No, I did not. I did not notice him doing anything.

Q. You weren't watching him, is that it?

A. I was not watching him.

(Testimony of Joyce Antonia Harrington.)

Q. Now, when the gun was pointed to his head, Mrs. Harrington, was it in his right hand?

A. Yes.

Q. And it was pointing to the temple?

A. Yes.

Q. And where was the left hand?

A. I didn't notice.

Q. Was the left hand touching the gun?

A. I didn't notice. I don't know.

Q. You don't know whether the left hand was up like this? (Indicating.)

A. No, I don't know.

Q. Now, Mrs. Harrington, while the gun was pointed by Mr. Harrington at his head did you hear this click again prior to the discharge of the gun?

The Court: Now, let's get this in sequence of time or in terms of time as clearly identified as possible. You mean immediately before the explosion?

Q. (By Mr. Murray): I am speaking about, now, did Mr. Harrington point the gun at his head more than once, Mrs. Harrington? [169]

A. No.

Q. And the time when he did point it at his head was immediately before the explosion?

A. Yes.

Q. I am referring now to that time when I ask you, when he pointed the gun to his head before the explosion, did you hear any clicking noises from the gun?

(Testimony of Joyce Antonia Harrington.)

A. No, because that is when it went off.

The Court: And you heard nothing but the explosion?

The Witness: That is right.

Q. (By Mr. Murray): Are you sure of that, Mrs. Harrington?

A. Yes, I am sure of that.

Q. Mrs. Harrington, do you recall talking to Officer Tognetti? A. Yes.

Q. The gentleman who was there shortly after the event? A. Yes.

Q. At the hospital, I believe it was?

A. Yes.

Q. And do you recall telling him what happened?

A. Well, I know that I was in the waiting room and he came in to talk to me, but if he did let me read the statement, I never read it, so I don't know—I mean, I was just answering questions that he would put to me.

Q. Well, we will come to that in a moment, Mrs. [170] Harrington. Did you give a statement to Officer Tognetti? A. Yes, I did.

Q. I show you Plaintiff's Exhibit 5 for identification and ask you if this is the statement?

The Court: You may take time to read it, Mrs. Harrington, and identify it as to whether it is your signature and what purports to be said in the statement.

The Witness: Yes, this is my statement.

(Testimony of Joyce Antonia Harrington.)

Q. (By Mr. Murray): And this is your signature?

A. Yes.

Q. Now, is there a statement there, a sentence——

The Court: You can read it. She says that's her statement, and you can question her about it. But just read it to her and she can say that you are reading accurately from the statement, Mr. Murray.

Mr. Murray: All right, your Honor.

Q. There is a sentence in the statement, I believe, which reads: "He clicked it about six times and then it went off. I was sitting on the couch and he was standing by the end table facing me with the gun in his right hand."

Now, does this statement refresh your memory about it?

Mr. Decker: Your Honor, I submit that this is not an impeaching statement.

The Court: Well, it might or it might not be. Let her tell us what it is. [171]

Mr. Decker: All right.

The Court: What I want to know is what you meant by clicking it five or six times before it went off?

Mr. Murray: "And then it went off."

The Court: Yes, "and then it went off." Now, what did you mean by that statement?

The Witness: I can only tell you from recollection that if he had pointed the gun at his head before and if he was clicking the gun while it was

(Testimony of Joyce Antonia Harrington.)

pointed at his head, I would never have allowed it. I would have done something to stop him.

The Court: No, we are not asking what you would have done. We are asking what you meant by that statement.

The Witness: It leads to the statement, your Honor.

The Court: In other words, what you are trying to tell me is that when you told Officer Tognetti—is that right? Officer Tognetti?

Mr. Murray: Yes, your Honor.

The Court: —that it was clicking, that he clicked it five or six times before it went off, you mean he was clicking it while he was either sitting down or standing up before you, but before he put it to his head?

The Witness: Yes, your Honor.

The Court: That is what you meant?

The Witness: Yes. [172]

The Court: He clicked it four or five or six times before he put it to his head?

The Witness: Yes. The total amount of clicking.

The Court: And then he put it to his head and without any clicking the gun went off?

The Witness: Yes.

The Court: Is that what you were saying, what you meant by that statement?

The Witness: Yes.

The Court: All right, now, you may cross-examine further.

(Testimony of Joyce Antonia Harrington.)

Mr. Murray: I have no further cross-examination, your Honor.

The Court: The statement itself certainly—or that portion of it is in the record and she has a right to explain, and she does, and you may cross-examine her further as to what she means by it.

Mr. Murray: Of course, your Honor, my only thought here is that it is obviously of some importance how these things happened.

The Court: Yes.

Mr. Murray: I am trying to find out the circumstances.

The Court: I have absolutely no quarrel with your method of approach, Mr. Murray. All I want to find out is what did she mean, as far as I can ascertain. I will have to [173] weigh whether the statement as it is and the explanation create any variances that have to be appraised in arriving at a judgment on the facts here, and I don't want to foreclose you by my questioning from asking any questions you want to ask.

Mr. Murray: Of course not, your Honor. Thank you.

Q. Mrs. Harrington, I think you have told us that, and I just want to be clear on this—no, let me ask another question.

At the time that the gun was pointed to Mr. Harrington's head did you see what he did which led to the discharge of the gun, to the gun firing?

A. Pardon?

Q. At the time the gun was pointed at Mr. Har-

(Testimony of Joyce Antonia Harrington.)

rington's head did you see what he did which led to the gun firing? A. No, I didn't.

Q. Now, after Mr. Harrington's injury, you have told us, of course, that you summoned the police. And I think you have also told us that you didn't touch the gun in any way, so that when the police arrived the gun was in the same position as it was after it had fallen from Mr. Harrington's hand? A. Yes.

Q. Did you touch anything else in the room?

A. No.

Q. So that when the police arrived everything was in the [174] same condition as it was at the time? A. Yes.

The Court: Where did you make the phone call?

The Witness: In the kitchen.

The Court: You have an extension there in the kitchen as well as in the living room?

The Witness: Yes.

Q. (By Mr. Murray): The police took the gun, Mrs. Harrington?

A. After that I didn't notice the gun at all or what happened to it.

Q. And in due course you got it back?

A. Yes.

Q. And then you gave it to Mr. Decker?

A. Yes.

Q. And has it been in your possession since you gave it to Mr. Decker? A. No.

The Court: Well, wait. I don't think that question makes much sense.

(Testimony of Joyce Antonia Harrington.)

Q. (By Mr. Murray): Did Mr. Decker give it back to you?

Mr. Murray: I am sorry, your Honor.

A. No.

The Court: What you mean is, has it been out of your possession since you gave it to Mr. [175] Decker?

Mr. Murray: I guess that would be more accurate, your Honor.

Q. Mrs. Harrington, you have already been paid the face death benefits under these two policies which are involved here, have you not?

A. Yes.

Q. Do you recall when the payment was made?

A. No; I don't; not exactly.

Q. Was it about March 21st of 1960?

The Court: That would be just a year ago today.

A. I don't remember. I really don't.

Q. (By Mr. Murray): Do you remember the amount?

A. The general amount was, I think, \$15,000.

Q. And there was some interest and what have you, so it was slightly in excess of \$15,000?

The Court: Would you answer audibly?

A. Yes.

Q. (By Mr. Murray): And in this case, Mrs. Harrington, you are claiming double indemnity benefits under these same policies? A. Yes.

Mr. Murray: I think that is all I have, your Honor.

The Court: Redirect examination?

Mr. Decker: I have no further questions, your Honor.

The Court: All right. That is all and you [176] are excused.

(Witness excused.)

The Court: Does the plaintiff have any further evidence?

Mr. Decker: Yes, your Honor, there are several items I want to check off here now.

The Court: Will you do so?

Mr. Decker: Counsel, can we read into the record that statement with respect to the cause of death by stipulation?

Mr. Murray: Why, I think so.

Mr. Decker: Your Honor, by stipulation of counsel, may the record show the following with respect to the cause of death of the decedent?

The Court: You mean this is some sort of a statement by an expert, a medical expert who has testified at some other place about the cause of death or has made a statement to the defendant company or something?

Mr. Decker: This, your Honor, is the verdict of the coroner's jury, reading from that verdict.

The Court: You will stipulate that this is the verdict of the coroner's jury and accurately describes the cause of death?

Mr. Murray: No, your Honor, we are stipulating that the information Mr. Decker is going to read are the facts just as he read it into the record in the morning. [177]

The Court: Well, what does that mean?

Mr. Decker: That you can accept this as being a fact, that this is the truth, that what I am about to read is the truth.

The Court: Without regard to its source?

Mr. Decker: Yes.

The Court: All right.

Mr. Decker: The fact, then, will be established as follows: "That the said Arnold Harrington, male, white, married, age 38 years, residence 716 Spruce Street, South San Francisco, California; nativity unknown; occupation, chief lab technician, came to his death on February 5, 1960, at 11:55 p.m. at the St. Luke's Hospital. Cause of death, gunshot wound of brain. Alcohol blood level 0.14 per cent."

The other item that I would like to introduce into evidence, your Honor, is the letter from the New York Life Insurance Co. denying the double indemnity benefit to Mrs. Harrington and presumably containing a statement as to the grounds therefor.

Counsel, do you have an office copy of that letter? We have searched for the original and failed to find it.

Mr. Murray: I will look for it, Mr. Decker. I am afraid that I don't.

The Court: I want to be sure I got that percentage of blood alcohol, or alcohol in the blood. Zero point 14? [178]

Mr. Decker: That's right.

Well, then, without—well, I would like to reserve my right to make this proof, your Honor. Counsel is unable to find his copy of the letter. I am sure we

will be able to come up with one before the day is over.

The Court: What do you want me to do? Just know the date of it?

Mr. Decker: I want more than that. I think I can say to your Honor that in view of the fact that we are asking for interest from the date that this proof was received there is a provision in the Insurance Code which becomes pertinent. It reads as follows——

The Court: Well, all I am interested in—I will let you go into it, but I don't want to take the time now to go into the reasons for it unless it becomes necessary. What I am trying to find out is what fact are you trying to establish. Maybe Mr. Murray will stipulate to it and we can dispose of the matter.

Mr. Murray: I certainly would if I knew what it was.

Mr. Decker: I am trying to establish the fact that upon receipt of the proof of death, which is in evidence, the insurance company denied liability for payment of double indemnity benefits upon the **ground that** the death was not accidental within the meaning of the policy, and that it did not request Mrs. Harrington to provide more specific proof than [179] she already had with respect to the circumstances surrounding the death.

Mr. Murray: Well, your Honor, I don't know whether this is true and I don't know—that is, I don't see the relevancy of it.

Mr. Decker: Well, it's because you are not

familiar with this code provision. It is highly relevant on this issue.

The Court: Well, what I want is either for Mr. Decker to have a chance to produce the letter and prove it or have a stipulation that that is what the letter says.

Mr. Murray: I would be glad to stipulate if I knew, your Honor.

The Court: Well, I am not at all being critical of you or your company, Mr. Murray, in this regard.

Mr. Decker: I think if the investigator is here I might be able to bring this out from him on examination under 2055. Are you going to put him on?

Mr. Murray: No.

The Court: Well, I don't know that the investigator—of course, 2055 is a lot broader than 43(b). The thing is that I would like to get at this in a way which will cause the least difficulty. As I take it, Mr. Murray, all you want to do is be able to examine the copy or the original and determine its accuracy, and whatever facts are in it, if they [180] are relevant, are admitted?

Mr. Murray: That's right, your Honor. I am relatively sure that a letter was sent denying liability, but I really don't know whether in that letter or elsewhere there was something said about no further proof, or something of that nature.

The Court: Well, I don't know whether it would be said, but that none were asked for, that is what Mr. Decker said. He didn't say that the letter said

that no further proof would be necessary, but he said no further proofs were requested.

Mr. Decker: That's right, your Honor.

The Court: And, of course, you would have to see the letter.

Mr. Murray: I think that I have seen such a letter, your Honor, and I think it may be at my office.

The Court: The point is, it seems to me that the letter itself would be the most satisfactory thing, or a stipulation concerning it. Can we leave the matter so that the letter can be supplied as a part of the record, or a copy of it, and, if not, that then Mr. Decker may have the right to make such other offer of proof that is appropriate to prove by way of secondary evidence what was in it?

Mr. Murray: Of course, your Honor.

The Court: And subject to that right, he can rest his case unless he has other matters he wants to present. [181]

Mr. Decker: I am prepared to rest subject to that understanding. I would like to offer in evidence the diagram.

The Court: Which diagram? The one on the board?

Mr. Decker: The one on the board.

The Court: How are we going to arrange that?

Mr. Decker: Well, I can arrange to have that photographed, if you wish. Actually, I will defer to the Court, in view of the fact that it is a court trial. If your Honor doesn't think it is necessary——

The Court: Frankly, I don't think it is necessary.

Mr. Decker: All right. Then I will withdraw my offer.

The Court: And the officer's diagram is sufficiently comparable for the purposes for which you gentlemen want to use it and I want to use it, to satisfy all the necessary facts. I think there is a difference in the placing of one chair, but I don't care about that.

Mr. Decker: Then I withdraw the offer.

Plaintiff rests, your Honor, subject to that understanding.

The Court: All right.

Mr. Murray: Your Honor, at this time the defendant moves under Rule 42(b) that the Court dismiss the action and enter judgment under that rule, upon the ground that upon the facts and upon the law plaintiff has shown no right to [182] relief.

I think, your Honor, that as a matter of law there is no evidence here, under the authorities, to support a finding that the death of Mr. Harrington resulted from accidental bodily injury within the meaning of the policies. I think, your Honor, that the cases which were cited in our brief are clear upon this point. And I think that under plaintiff's view of the case, the view that Mr. Harrington was injured while he was either fanning or fooling with the safety, with the trigger mechanism of the gun, while it was pointed at his head in a fully loaded condition, I think that under the authorities this

makes out as a matter of law a situation where the insured needlessly, without good cause, and recklessly assumes a risk, a tremendous risk which any prudent man would recognize as highly dangerous.

Now, your Honor, the authorities are set out in full in our trial brief and I am prepared to discuss them at this time, if your Honor cares to.

The Court: Well, I am concerned with the practice which should be followed here. If this motion were made to me in a case to be tried to a jury, I would, under the better practice, withhold ruling or reserve ruling on your motion, present the case to the jury, and then test your motion on a motion for judgment notwithstanding the verdict. I would do this because then if there was a disagreement with my ruling, assuming I were to concur with you, the plaintiff [183] would have the right to test my ruling on an appeal, and if I were wrong and were in error the Court of Appeals could then reinstate that verdict. This, I think, is a better practice.

Now, here I do not have a situation of having another agency or another arm of this court trying the facts. I am the trier of the facts as well as determining the questions of law, so that I presume that I should know the law now, and perhaps could do that if I were sufficiently apprised as to what the law is.

But I think that it would be wise for me to follow somewhat the same practice here and get the evidence before me, whatever you have, even though it means that you are putting on evidence while you

wait for a ruling on your motion. But I think it would be better practice from the standpoint of getting the case disposed of to do that, simply to say to you that I would have to weigh the evidence in the light in which it is now presented by the plaintiff to determine the question raised by your motion.

As I understand, if I were to deny your motion, you would only have a short amount of evidence to introduce anyway.

Mr. Murray: That is right, your Honor.

The Court: Weighing that, I think the better thing for me to do would be to reserve ruling on this motion, you [184] proceed with your evidence, hear it, and then hear the arguments for judgment in this case and then determine your question at that time and dispose of it.

As a practical matter, I don't think there will be very much difference between the question to be decided on this motion and the question to be decided on determining judgment for the plaintiff or judgment for the defendant.

Mr. Murray: I think your Honor is correct in that.

The Court: Because of that, I think I should go ahead and so I will just simply say that I will reserve ruling on that until the time of judgment in the case, or until the time of making a decision in this case on plaintiff's complaint, and if I agree with you I will just award judgment for the defendant and if I disagree with you I will simply award judgment for the plaintiff. So I don't think

there is much difference here in the posture of the case at either point of the case.

All right, your motion to dismiss, then, will be taken under submission and ruling will be reserved until the time for judgment.

Mr. Murray: Thank you, your Honor.

At this time I would like to call Mr. F. Bob Chow.

FRANK ROBERT CHOW

called as a witness for the defendant, being first duly sworn, testified as follows: [185]

The Clerk: Please state your full name to the Court.

The Witness: My name is Frank Robert Chow.

Direct Examination

By Mr. Murray:

Q. Where do you live, Mr. Chow?

A. I live at 1446 Jackson Street.

Q. And what is your business?

A. I am a professional gunsmith and I own a sporting goods store.

Q. And what sort of activities do you carry on at the store?

A. Why, sales and service of all types of fire-arms, principally hand guns.

Q. Do you have shop facilities in the store?

A. I do, sir.

Q. And these are facilities for testing and repairing guns? A. Yes.

Q. How long have you been a gunsmith, Mr. Chow?

(Testimony of Frank Robert Chow.)

A. Oh, in the neighborhood of about thirty years.

Q. Do you have any specialty in your profession?

A. Yes, sir; I specialize in hand guns.

Q. And what do you do in connection with hand guns?

A. Oh, I repair and test and fire and anything pertaining to hand guns, its repair and [186] upkeep.

Q. Have you ever shot hand guns in competition? A. Yes, I have.

Q. Under what circumstances?

A. Oh, I at the present time am shooting for the San Francisco Police Revolver Club and for various other clubs like the Oakland, and so forth.

Q. Have you ever shot in an Olympic team?

A. Yes, sir, I did.

Q. The United States team?

A. Yes, sir.

Q. Have you ever held any world's shooting record?

A. Yes; I have been fortunate enough to hold nineteen.

Q. Nineteen shooting records? A. Yes.

The Court: Is this in the hand gun area?

The Witness: Yes, sir.

The Court: Do you shoot rifles, too?

The Witness: Yes, I do.

The Court: Are you acquainted with my old friend, Johnny Adams?

(Testimony of Frank Robert Chow.)

The Witness: You bet I am.

The Court: He was at Stanford when I was there and he was then the world's rifle champion.

The Witness: Right.

Q. (By Mr. Murray): Mr. Chow, do you belong to any [187] societies having to do with guns?

A. Yes, I do. I am a director of the National Rifle Association at the present time.

Q. Any others?

A. President of the Western Revolver Association, adviser to the San Francisco Police Revolver Club, the Oakland Club, and various other clubs in the area.

Q. Mr. Chow, you have told us that you sell guns at your store. What is the address of your store? A. 3185 Mission Street.

Q. Now, do you sell both new and used guns?

A. Yes, I do.

Q. What, if anything, do you do in connection with the mechanical condition of the guns you sell?

A. Whenever I purchase a gun, the first thing I do is make sure that it is in perfect functioning order and if it is not, why, I repair it before I put it on the shelf to be sold.

Q. You check the mechanical condition of the gun? A. Yes.

Q. Do you check the condition of the hammer of the gun, for example?

A. Oh, yes, everything connected with it is checked.

Q. The safety?

(Testimony of Frank Robert Chow.)

A. Yes, the safety manual and all that is [188] checked.

Q. If you find anything wrong with the gun, do you fix it?

A. That is the first thing I do.

Q. And this is before it goes into inventory?

A. Yes.

Q. Who does this job, Mr. Chow, you or your employees?

A. I do it myself, personally. I have employees, but I handle all the hand guns myself.

Q. So in what condition would you say your guns are when they are placed in inventory?

A. When they are placed in inventory they are in perfect condition, so far as function and service is concerned.

Q. Mr. Chow, did you know Arnold Harrington?

A. Yes, sir, I did.

Q. How long had you known him?

A. Approximately from about 1959 on.

Q. Do you know how long a period that would be?

A. Oh, it would be a period of, counting up to the present time, it would be about nearly three years.

Q. Mr. Harrington died about a year ago, so it would have come——

A. (Interposing): Somewhere in the neighborhood of two years.

Q. About two years?

A. Yes. [189]

(Testimony of Frank Robert Chow.)

Q. What were your relations with Mr. Harrington?

A. He is a customer and client of mine that comes in the store quite frequently.

Q. I understand he worked across the street; is that correct?

A. Very close. St. Luke's Hospital is almost directly across the street from the store.

Q. When would he come in?

A. Oh, he would come in at various times. Usually at noon when he was having his lunch hour, I suppose. I never made much note about the time.

Q. And he came in frequently?

A. He came in fairly frequently, yes.

Mr. Decker: I am sorry, I didn't hear that.

The Court: "Came in fairly frequently."

Q. (By Mr. Murray): Did Mr. Harrington buy any guns from you? A. Yes, sir, he has.

Q. About how many guns did he buy?

A. In checking back on the records, I have found he had purchased five different hand guns from me.

Q. Hand guns? A. Yes.

Q. He didn't buy rifles?

A. No, no rifles. [190]

Q. And these were different types?

A. Various types. I have a list, if you would like to have it.

Q. If the Court is interested in having the gun list——

The Court: I am not.

(Testimony of Frank Robert Chow.)

Q. (By Mr. Murray): Did Mr. Harrington buy ammunition from you?

A. Yes, he has purchased ammunition from me.

Q. For his guns?

A. Yes, for all the different type of guns he purchased, yes.

Q. Was Mr. Harrington familiar with guns?

A. Yes, I would say he is.

Q. Upon what do you base that conclusion?

A. Oh, on the conversations we would have and the way he would handle the weapon.

Q. Did he talk about guns?

A. He would talk about guns, yes.

Q. Did he demonstrate any knowledge about them?

A. Oh, yes, from the way he handled the weapon you could see he knows something about guns.

Q. Was he familiar with the guns he bought from you?

A. Yes, he was plenty familiar with them. I don't know about how familiar he is because I haven't seen him shoot.

Q. Did he discuss with you having fired the guns? [191]

A. Yes, some of the others he has, yes.

Q. And the method of operation?

A. Yes.

Q. Did you sell Mr. Harrington a German Mauser automatic pistol?

A. Yes, sir, I did.

(Testimony of Frank Robert Chow.)

The Court: Will it be stipulated that is the same pistol involved here or do we have to go through it?

Mr. Murray: We don't have to go through that.

Mr. Decker: No, that is stipulated.

The Court: Then the stipulation is that the pistol involved in this incident was purchased by Mr. Harrington from Mr. Chow?

The Witness: I have the serial number.

The Court: Well, you don't have to do that. You don't have to prove it. There is no necessity of doing that.

Q. (By Mr. Murray): Mr. Chow, did you check this gun out? A. Yes, sir, I did.

Q. In what condition was the gun when it was sold to Mr. Harrington?

A. When it was sold to Mr. Harrington it was in perfect operating condition as to safety and to function.

Q. Are you familiar generally with the method of operation of this type of gun?

A. Yes, sir, I am. [192]

Q. Have you ever sold Mausers of this type before? A. Yes, I have.

Q. At the time you sold the gun to Mr. Harrington could it be fired with the safety set on safe?

A. Not set on safe, no.

Q. How do you know that?

A. Because I checked it and tried it myself numerous times.

Q. Before you sold it? A. Yes.

Q. Mr. Chow, based upon your experience with

(Testimony of Frank Robert Chow.)

guns, would it be prudent under any circumstances for a man familiar with guns to point such a gun, loaded, at his head and pull the trigger?

A. Let's state it this way: I wouldn't do it myself.

The Court: I think I will have to strike that answer in the way it is put. I know what he means. I think what he means is that it would not be a safe practice. But, Mr. Chow, the question put to you as an expert in firearms is not what you, yourself, would do, but what any person who was dealing with firearms generally, would it be a safe practice to point a firearm at your head?

The Witness: No, it's not a safe practice to point a firearm at your own self or at anyone.

The Court: This is an unsafe practice in and of [193] itself regardless of the condition in which the gun is?

The Witness: Yes, sir.

The Court: That's your opinion as an expert?

The Witness: That is my own opinion.

Q. (By Mr. Murray): And what if he thought the safety was on?

A. I wouldn't trust safeties and I wouldn't trust anything about firearms.

Q. When it comes to pointing it at your head?

A. Yes, sir.

Mr. Murray: That is all I have, Mr. Chow.

The Court: You may cross-examine.

Mr. Decker: Thank you, your Honor.

The Court: Well, just a moment. I think we

(Testimony of Frank Robert Chow.)

had better take our afternoon recess and then you can cross-examine Mr. Chow. Mr. Chow, if you will be available after recess for cross-examination, we will go forward.

The Witness: I will, sir.

(Short recess.)

The Court: You may proceed.

Cross-Examination

By Mr. Decker:

Q. Mr. Chow, as I understand your testimony, when you sold this gun to Mr. Harrington it had no mechanical defects of any kind? [194]

A. That is right.

Q. By the way, do you know the date of that sale?

A. Yes, I have it here, if I may refer to my notes.

The Court: Why, certainly.

A. The last sale was 1/14/60. That is January 14th, 1960.

Q. (By Mr. Decker): Do you know of your own knowledge that that is the sale of the hand gun that is in evidence here?

A. Yes. I took this notation from my firearm registry, which is mandatory for all bona fide dealers to keep.

Q. All right. Now, Mr. Chow, you indicated that Mr. Harrington had discussed with you the operation of some of his guns?

A. Yes, sir.

(Testimony of Frank Robert Chow.)

Q. Had he ever done that with relation to this gun?

A. Yes, he wanted to know how to load it, and he wanted to know how to operate the safety on it and what sort of safety it did have on it, and I explained it to him.

Q. This was before he purchased it?

A. Well, maybe before and even afterwards, because I make sure all my clients are well checked out before the gun is delivered.

Q. Do you have any recollection of his coming back to your shop after he purchased the gun and discussing with you [195] the operation of the gun?

A. No, sir, I did not see the weapon again.

Q. You didn't see the weapon again after it left your shop? A. No, sir.

Q. And you have no recollection of him coming in without the weapon and discussing the operation of it after you sold it to him?

A. I have no recollection at all.

Q. Mr. Chow, you have indicated that in the condition the gun was at the time you sold it to Mr. Harrington, it would be impossible for the gun to fire with the safety mechanism on safe?

A. That is right.

Q. I suppose, then, sir, that it is not unusual in your experience for owners of guns of this type to rely completely upon that safety mechanism; isn't that true?

A. That is true. A lot of people rely on the safety mechanism.

(Testimony of Frank Robert Chow.)

Q. And can you tell us whether or not from your conversations with Mr. Harrington and your knowledge of him that he placed complete reliance upon the safety mechanism on this gun?

A. I could not tell you that, sir, because I do not know Mr. Harrington's feelings regarding to [196] safety.

Q. I see. Are there various——

The Court: I just want to be sure, you say, "Regarding to safeties." You mean "t-o"—not "t-w-o"?

The Witness: Not "t-w-o," no. To safeties.

Mr. Decker: Well, I am not sure——

The Court: "In reference to" is what he means.

Q. (By Mr. Decker): And particularly, this particular gun, you don't know what his attitude was toward it? A. No.

Q. All right. Mr. Chow, with respect to various types of firearms, some safety mechanisms are considered more safe than others, isn't that so?

A. That is right.

Q. And with respect to this particular gun, would the safety mechanism on this gun be considered one of the more safe types?

A. Yes, sir. This weapon is constructed so that when the safety is on, the hammer is actually locked, and on most weapons the cylinder is locked, so this one here is really a very safe safety.

The Court: What do you mean by the hammer is locked?

The Witness: You take any double-barreled

(Testimony of Frank Robert Chow.)

shotgun, a lot of people think the hammer is being held when you put the safety on, but it is actually not. The only thing holding is your trigger is held so you can't pull the trigger, but [197] your hammer is still able to slip off the cylinder. But this one here, when you have the safety on your hammer is cammed and locked into a locking place and it can't——

The Court: Well, what you mean by that is not that the hammer won't—the spring won't release the hammer, but if it is released there is a cam in between the hammer and the firing pin so that there can be no accident while the safety is on, of the hammer slipping and going forward and hitting the firing pin?

The Witness: That is right, sir.

Q. (By Mr. Decker): So is there a particular descriptive phrase or term in the gun business which describes this type of a safety mechanism—"positive action"—or something of that sort?

A. Well, if you are going to describe it as any action, it would be a safety that actually locks the hammer.

Q. Actually locks the hammer? A. Yes.

Q. And this is considered a more safe type safety than the type that does not actually lock the hammer, is that right? A. That is right.

Q. Did Mr. Harrington know this?

A. I have explained to him, yes, about this.

Q. Mr. Chow, the evidence in this case indicates that [198] following the incident which we are con-

(Testimony of Frank Robert Chow.)

cerned with here, the gun was found lying on the floor in the cocked position and with nine rounds of live ammunition in it and one empty cartridge was found, having been ejected, apparently, from the gun. It was found in the room.

With your knowledge of this particular gun, would it be your opinion that the gun had been fully loaded immediately prior to discharge and that one round had been discharged?

A. Without checking—like all gunsmiths, we work on various types of weapons, and without actually checking with rounds, I am not quite sure whether that held ten rounds in the magazine or whether it held nine rounds in the magazine and one in the chamber. Now, that I couldn't tell you without testing it, right at the moment.

Q. Would that affect your answer? You see, what I am getting at is this: This is the kind of a gun, is it not, that automatically recocks itself following discharge?

A. Yes. It is what they call a semi-automatic.

Q. A semi-automatic hand gun?

A. Yes. You fire and the recoil actuates the action and throws another round in.

Q. And then upon the magazine being emptied and the last live round fired, the gun will leave itself with the slide back?

A. Yes. It stays open because the powder from the [199] magazine has now come up in line where the cartridge is supposed to be and proceeds to lock back.

(Testimony of Frank Robert Chow.)

The Court: This is a little argumentative, but while I have an expert here I would like to have you tell me, what is the significance of what you have been asking?

Mr. Decker: The last few questions?

The Court: Yes.

Mr. Decker: Merely corroborative of the expert who was called for the plaintiff, your Honor.

The Court: Still, what is the significance of it in terms of fact? I may want to ask this man some questions about the significance of this.

Mr. Decker: I think I must confess to you, sir, that it has no significance, really. I have nothing in the back of my mind except to try to bring out all of the characteristics of this hand gun insofar as I am able to do so.

The Court: All right. I can't think of any. If you had something, I wanted to know about it so I can ask this man about it because I consider him a very qualified expert.

Mr. Decker: You recall, your Honor, that when the officer testified he said when he found the gun it was in the cocked position?

The Court: Yes. It's obvious the gun had been fired and recocked and reloaded itself, ready to shoot again and the safety was off. [200]

Mr. Decker: I think it may be more obvious to you, your Honor, than it is to me because I think you know a little bit more about guns than I do.

The Court: I don't want to superimpose what I know. I know just enough to be dangerous, is all,

(Testimony of Frank Robert Chow.)

and if there is a real problem of expert knowledge here I want this man's expert opinion.

Q. (By Mr. Decker): All right, let's leave that subject for a moment. You spoke, sir, of the danger or the violation of the safety rule involved in pointing a loaded gun at one's head.

The Court: An unloaded one.

Mr. Decker: I was going to ask that as being the next question.

Q. You would also have answered the same had the gun been an unloaded gun?

A. Yes, I would.

Q. And these are just two of the cardinal principles that all people who handle guns follow in connection with good safety practice?

A. That is right, sir.

Q. Another such rule would be that of never trying to go through a barbed wire fence carrying a shotgun?

A. That is right.

Q. And I dare say you could recite a whole list of such [201] safety practices, could you not?

A. That is right.

Q. It is nonetheless true, of course, is it not, sir, that even people who are accustomed to handling firing guns oftentimes do not follow these safety rules that we have referred to?

A. You are correct, in many instances.

Q. And this often results in tragedy, doesn't it?

A. Yes, sir.

Q. I want to ask you this, Mr. Chow, and I think this will conclude my examination:

(Testimony of Frank Robert Chow.)

With the gun in the condition it is now, you have already testified that it will not fire. It will not discharge. If the hammer is released by the trigger it will not fire, isn't that right, because it is on safe?

A. If it is on safe, yes.

Q. I am sorry, you can see the safety lever is in the safe position?

A. Yes.

Q. And the same is true if the hammer is released by moving the safety forward?

A. That's right.

Q. It won't fire?

A. No, sir.

Q. And the same would be true if one in the process of [202] attempting to cock the gun should inadvertently release it, it wouldn't fire if the safety mechanism were on?

A. If the safety is on it will not fire, that's right.

Q. So it would be your testimony, or your opinion, wouldn't it, sir, that if the gun did fire, then the safety mechanism would have had to be off the safe position?

A. That is right.

The Court: It would have had to be what we call "on"? It would have to be in the firing position?

The Witness: Yes, in the firing position, not "on" or "off."

Q. (By Mr. Decker): Is there any point between the full safe position and the full fire position that the gun will fire?

A. If the piece is worn and the lever is part way back, under certain circumstances, it could cam

(Testimony of Frank Robert Chow.)

through with sufficient force to ignite the cartridge, but usually you have to release it completely before it will fire.

Q. So then it would be your testimony, sir, that the gun is much more dangerous in that condition than it would be in the full safe position?

A. Yes, it would be.

Mr. Murray: In the fire position, Mr. Decker?

Mr. Decker: No, in a position close to the fire position but not all the way to it. [203]

Q. Now, another thing I wanted to bring out, sir, is that there is some sort of a mechanism for locking this safety lever into place in the safe position and in the fire position, isn't that so?

The Court: You mean on this gun?

Mr. Decker: Yes.

The Witness: On any weapon there is a little——

The Reporter: I am sorry, I can't hear you.

The Court: Will you repeat that?

The Witness: The safety mechanism has a tendency to cam over into a kind of—kind of like a little recess there, like. In other words, like a recess where it cams into. It's a little bit harder when it's on. You can feel it's a little bit harder. Actually, what you will do, you cam in the hammer which makes it a little heavier.

Q. (By Mr. Decker): Yes. What I am getting at is this: It is much easier to move this safety mechanism between the full safe position——

A. Yes, it is.

Q. ——and the full fire position?

(Testimony of Frank Robert Chow.)

A. Right.

Q. Than it is to move it from either of those positions? A. Right.

Mr. Decker: Do you follow me, your Honor?

The Court: Yes, I follow you exactly. It's like a [204] cocked switch on a railroad?

The Witness: That's right. It can swing either way.

Q. (By Mr. Decker): Mr. Chow, assuming that this particular gun had been fully loaded and the handler of it had been producing this noise without discharging it (demonstrating), this noise, without discharging it, then it would be your opinion that the safety mechanism was on full safe?

A. Then it would have to be on full safe. Otherwise it would discharge.

Q. Right. Now, in your experience with the gun, what kind of an explanation could you give which would account for the gun being placed in the firing position, or, at least, in a position close enough to it so that it would fire, without the actor intending to do that? Do you understand my question?

A. Yes, I do. It's like anything else, a safety can be pushed off because you want to push it off, manually, and it could be—under certain circumstances, it could be brushed off. There could be a lot of things could happen. That is, an accident is an accident.

Q. You are referring now to the factor of human error involved?

A. That's right, human error.

(Testimony of Frank Robert Chow.)

The Court: What you are saying is that it could unintentionally be moved from a safe position to a firing position? [205]

The Witness: That's the only way the weapon would fire, is to move it, so if you move it, it has to be moved either intentionally or unintentionally, or accidentally, or whatever it is.

Q. (By Mr. Decker): Could you illustrate how this might have been done unintentionally?

A. Well, as you know, once you have taken it off the safe it moves rather smoothly, so that could be done in many ways. It could be caught in your clothes, a sleeve; it could be caught on—it could be caught on (inaudible). He could be cleaning it. There's lots of things that could cause it. That comes in the realm of "one of those things."

Q. You wouldn't consider this to be an impossible thing to happen, would you, sir?

A. Nothing is impossible, sir.

Q. I notice, among other things, that in cocking this gun, one has to pull the hammer back to this position.

The Court: Would you do this where Mr. Murray can see you?

Mr. Decker: I am not intentionally hiding it, your Honor.

The Court: I know that.

Q. (By Mr. Decker): I notice that in order to place a gun into a firing position, if there has been no prior discharge of the gun to automatically put it in that position, [206] one has to pull the hammer back in this fashion, isn't that so?

(Testimony of Frank Robert Chow.)

A. Yes, if it has not been cocked previously, yes.

Q. In your opinion, would it be a reasonable possibility—a reasonable possibility—that in doing that, the handler of the gun might inadvertently pull the safety mechanism back to the firing position?

A. It is possible.

Mr. Decker: I think that is all. Thank you, Mr. Chow.

The Court: Redirect examination?

Mr. Murray: Thank you, your Honor.

The Court: If you want to take a moment to review your notes, you may do so.

Mr. Murray: Thank you, your Honor.

Redirect Examination

By Mr. Murray:

Q. Mr. Chow, in response to Mr. Decker's questions, I believe you testified that you have known or heard of individuals familiar with guns who didn't follow the safety rules and who sometimes relied upon the safety mechanism?

A. Yes.

Q. Mr. Chow, would knowing this change your opinion as to whether or not it would be prudent for a man to point this gun, fully loaded, to his head?

A. Yes, I would say it's prudent. [207]

Q. It's prudent?

A. I think it's a foolish thing to do, to point it at your head.

Q. It is a dangerous thing to do?

A. Yes, that is right.

(Testimony of Frank Robert Chow.)

Q. And the fact that some people do it doesn't make it safe?

A. It doesn't make it safe at all, no, just because somebody relies on the safety.

Q. Now, Mr. Decker discussed with you, I believe, the question of the moving of the safety lever from the safe position to the fire position, and with particular reference to the time just before it snaps into the firing position, and in response to his question I believe you said that if the safety mechanism is worn, the cam is worn, conceivably the gun could fire, even though it is not on the full firing position?

A. That is right.

Q. With reference to this gun, Mr. Chow, do you have any information which would——

The Court: Would you speak a little more loudly, please?

Q. (By Mr. Murray): With reference to this gun, do you have any information which would lead you to believe the cam was worn? [208]

A. I haven't examined the weapon ever since it left the shop so I do not know what condition it is in, but I could give you a simple test.

Q. Was it worn when it was sold to Mr. Harrington? A. No, it was not.

Q. If you would like to test it, all right.

A. At the present time it will not fire even if it is slightly off of the safe position.

Q. It will not fire? A. No.

Q. Now, I think we were discussing a moment ago, or you were discussing with Mr. Decker, the

(Testimony of Frank Robert Chow.)

noise which the gun might make with the hammer cocked in this fashion. There are several ways, as I understand it, to make this noise. You can cam the hammer back as I am doing now?

A. Yes.

Q. Or you can pull it back with the safety on, or pull it back with the safety on and pull the trigger?

A. Yes.

Q. Now, you have testified in response to questions by Mr. Decker that in any of these methods the safety, I think, ends up on safe and the gun will not fire. Now, Mr. Chow, under this assumption, would it be a prudent thing for a man with a loaded gun to point it to his head and then monkey around with the hammer in this fashion? [209]

A. I would think it would be very foolish to do it.

Q. And dangerous? A. And dangerous.

Mr. Murray: That is all I have, your Honor.

The Court: Any recross-examination, Mr. Decker?

Mr. Decker: You wouldn't consider it, though, inconceivable that somebody familiar with a gun and relying on the safety mechanism could do that, would you, sir?

The Witness: It has been done.

Mr. Decker: Thank you, very much, Mr. Chow.

The Court: All right, Mr. Chow, that is all. Thank you.

(Witness excused.)

The Court: Are there any further witnesses on behalf of the defendant?

Mr. Murray: Yes, your Honor, I have one witness, Mr. Lowell Bradford, who is a gun expert and has examined the gun on our behalf. I realize we have covered some of this material.

The Court: Is there anything special that you want from him?

Mr. Murray: There are a few additional questions I would like to ask Mr. Bradford.

The Court: Is he here?

Mr. Murray: Yes, your Honor. [210]

The Court: All right, you may call him as your witness.

LOWELL W. BRADFORD

called as a witness by the defendant, being first duly sworn, testified as follows:

The Clerk: Will you please state your name to the Court?

The Witness: Lowell W. Bradford. L-o-w-e-l-l. The last name is B-r-a-d-f-o-r-d.

Direct Examination

By Mr. Murray:

Q. Where do you live, Mr. Bradford?

A. In the City of Campbell, California, at 31 North Carlyn Avenue.

Q. And what is your work, sir?

A. I am a criminologist, sometimes called an examiner of physical evidence, or a consultant in criminalistics.

(Testimony of Lowell W. Bradford.)

Q. Do you have any official connection with a unit of the government? A. Yes.

Q. And what is that?

A. I am the director of the laboratory of criminalistics in Santa Clara County, which is a part of the department of District Attorney in that county.

Q. What are your duties as director of that laboratory? [211]

A. My duties are the examination of various kinds of physical evidence submitted by the various enforcement agencies and the administration of the laboratory in respect to this work.

Q. Do you have assistants in your work?

A. Yes.

Q. How many are there?

A. A total staff of about seven.

Q. And you have, I take it, laboratory facilities for use in your work? A. Yes.

Q. I wonder if very briefly, Mr. Bradford, you would give us your educational and professional background with particular reference to firearms and ballistics?

A. My education in college consists of six years in all, all taken at the University of California in Berkeley. My background in connection with firearms included some training in ballistics at the University as an undergraduate student in the ordnance R.O.T.C. program. Later, during the war, I served approximately five years in the Ordnance Department connected with firearms and ammunition technical problems.

(Testimony of Lowell W. Bradford.)

Since that time, for about 13 or perhaps a few more years, I have been involved in the examination of evidence. I have had occasion to examine many different types of firearms concerning the various functioning and manipulative problems. [212]

Q. Have you ever been employed professionally by the State of California? A. Yes.

Q. What were your duties?

A. I was State Criminologist while employed by the State, in the Department of Justice.

Q. And when was this, sir?

A. It was in 1947.

The Court: Is that a part of the Bureau of Criminal Identification?

The Witness: Yes.

The Court: Identification and Investigation?

The Witness: C. I. and I.

Q. (By Mr. Murray): And when did you establish the laboratory in San Jose?

A. This was established in the forepart of 1948.

Q. And you have been its director since?

A. Yes.

Q. And have you taught courses on the handling of small arms and upon ballistics and forensic evidence and things of that nature? A. Yes.

Q. And where was this?

A. Part of this work was done at the City College of San Francisco in about 1952 and 1953 as part of a course in [213] scientific evidence presented to police officers. For about 12 years I have been an associate or assistant professor of police

(Testimony of Lowell W. Bradford.)

at the State College in San Jose, and part of the teaching there was devoted to firearms, technical information. I also taught a course in hunter safety to prospective instructors in that subject in the city school program in San Jose.

Q. What sort of safety?

A. Hunter safety.

Q. Do you belong to any professional societies or associations having to do with firearms or ballistics?

A. Yes.

Q. And what are they?

A. I am a life member of the National Rifle Association, and on the technical side, a member of the California Association of Criminalists, and the American Academy of Forensic Sciences, which deals in legal scientific problems.

Q. Are you yourself familiar with the firing of rifles and small arms?

A. Yes.

Q. Now, Mr. Bradford, did I ask you to examine a gun to determine its method of operation?

A. Yes.

Q. And did you receive such a gun?

A. I did. [214]

The Court: Well, let's not waste time on this. This is the gun involved in this case. Is there any argument about it?

Mr. Murray: No, none whatever, your Honor.

The Court: All right, let's proceed.

Q. (By Mr. Murray): You did examine a gun?

A. Yes.

Mr. Murray: May it be stipulated, Mr. Decker,

(Testimony of Lowell W. Bradford.)

that I received a gun from you prior to delivering it to Mr. Bradford?

Mr. Decker: Surely.

Q. (By Mr. Murray): I wonder if you would just look at the gun there, Mr. Bradford? You can satisfy yourself it is unloaded, if you like.

Is this a German Mauser? A. Yes.

Q. Are you familiar with a Mauser of this type?

A. Generally.

Q. Have you examined such guns previously?

A. Yes.

Q. Now, what did you do with this gun in connection with your examination?

A. My examination consisted of manipulating the firearm to ascertain whether or not it was in a normal functioning position or condition. I tested the trigger pull by weight [215] required to fire it. I also applied tension tests to the safety mechanism to determine how much pull is required to put the weapon off the safety position. I also determined various ways in which the safety hammer combination operated, and I finally—I tried these tests on the safety mechanism to ascertain whether or not it was working in the final stage by using a cartridge case in the chamber which had the powder and bullet removed but with a primer in the case, to ascertain whether or not it could be fired.

Q. And did you fire the gun?

A. No, only the primer was the only thing I fired.

Q. Did you disassemble the gun?

(Testimony of Lowell W. Bradford.)

A. I did not.

Q. In what condition did you find the gun, Mr. Bradford?

A. I found the weapon in what I would call normal functioning condition.

Q. How did you find the action of the trigger?

A. The action of the trigger was normal.

Q. And of the hammer?

A. The hammer, normal.

Q. And of the safety? A. Normal.

Q. Mr. Bradford, I wonder if you would please take the gun once again and demonstrate briefly to us the manner in which the gun is loaded? [216]

A. The weapon may be loaded by one of two methods. When the bolt is retracted in the position I now have it, in looking in from the top of the breach mechanism, one can see the follower of the magazine.

The rounds can be inserted by simply placing them in there and with the thumb, pushing them down. There is also made for this weapon a clip which fits in a notch in the top of this weapon. I have such a clip with me. It will contain as many as ten rounds but will function with less. Without inserting any empty cartridges which I now have in the clip, these are placed as I have equipped now in the top of the mechanism and then, with the thumb, the rounds can be simply pressed, at which time they will be transferred from the clip into the magazine, and then the clip may be released and

(Testimony of Lowell W. Bradford.)

the bolt will go forward and will load the top round in the chamber.

If the rounds are loaded separately by hand, one can either leave a round in the chamber or push it down in the magazine, whichever the case may be.

The Court: As long as you leave room enough for the breech to close without shoving a shell into the barrel?

The Witness: Yes, your Honor, that's right.

Q. (By Mr. Murray): How many rounds will this one hold if fully loaded?

A. I think it holds ten in the magazine. I wouldn't be [217] sure of that unless I put ten in it, but I believe it holds ten in the magazine.

Q. When you say "the magazine," do you include also the chamber?

A. When I say "magazine," I do not include the chamber.

Q. In what position would the gun normally be immediately after it has been loaded, Mr. Bradford?

A. The normal procedure on loading is for the breech bolt to move forward and be in the closed position with the hammer in the cocked position and the safety in the fire position.

Q. And how would the cartridges be unloaded, assuming the gun were not to be fired?

A. If one desires to unload the cartridges from the magazine or the chamber in this particular weapon it is necessary to grasp the weapon in one hand or the other, either by the grip or the forepart

(Testimony of Lowell W. Bradford.)

of the magazine, and then retract the bolts successively by simply pulling it, which makes it go through its cycle of extraction and ejection and the cartridge cases are ejected out, one by one.

The Court: In effect, you are pumping the shells out?

The Witness: Yes, sir. And at the time of pulling out the last round the breech mechanism stays open as I have it now.

Mr. Murray: Mr. Bradford, did you take any photographs of the gun in its normal operating position? [218] A. I did.

Q. Do you have those photographs with you?

A. I do.

Q. Would you produce them, please?

A. Yes, sir.

The Court: Is there any objection to them going into evidence?

Mr. Decker: No, your Honor.

The Court: Put them in evidence.

Mr. Murray: In the order in which they are marked now.

(Photographs referred to were received in evidence as Defendant's Exhibits C-1, -2 and -3.) [219]

Q. (By Mr. Murray): These are photos of this particular gun, are they, Mr. Bradford?

A. Yes, they are.

Q. Let me give you back the photographs, Mr.

(Testimony of Lowell W. Bradford.)

Bradford. Using these photographs, Mr. Bradford, and the gun, if you choose, would you please show us in detail the method of operation of the gun?

A. At what point did you want me to start, please?

Q. Why don't you start with photograph 1?

The Court: C-1.

Q. (By Mr. Murray): Photograph C-1 in evidence.

A. C-1 represents the position of the gun when the safety is in the fire position, the "F" showing, the hammer fully retracted. In this position the gun can be fired by pulling the trigger. The position—Photograph C-2 is a photograph showing the hammer in the same cocked position, but with the safety lowered into the safe position, yet the safety has not been lowered sufficiently far to cause the hammer to drop. And the third possible arrangement is to have dropped the hammer as in picture C-3, the safety likewise in a full forward position. This photograph shows that.

The Court: When you say "full forward," you mean in the safe position?

The Witness: Full forward safe position, yes, sir.

The Court: Yes. [220]

A. (Continuing): This photograph shows the space between the hammer and the area of the firing pin, which is the principal basis of the safety arrangement in this position.

Q. (By Mr. Murray): Mr. Bradford, did you

(Testimony of Lowell W. Bradford.)

test the trigger pull on this gun? A. Yes.

Q. And what did you find?

A. Trigger pull had a variation. I was able to pull the trigger so that it would drop the hammer with a pull as small as two pounds fourteen ounces, and was always able to pull it with a pull as high as three pounds four ounces. So the range then varies between these two limits.

Q. This is——

The Court: Three pounds how many ounces?

The Witness: Three pounds four ounces.

The Court: Thank you.

Q. (By Mr. Murray): This is a normal action on a gun of this sort?

A. In my experience, this is normal for this type of weapon.

Q. I wonder if you would put that slide back in again, Mr. Bradford. I am not sure I know how.

Mr. Bradford, starting the hammer back and the safety in the fire position, you have demonstrated that you can push the safety up to this position, which is where it clicks, and [221] showing safe, let the record show, and pull it, and then the hammer will come to a position about what, about a sixteenth of an inch from the firing pin?

A. Well, it leaves a space. It is something on that order of size.

Q. Well, now, will the gun fire when the hammer does this?

A. This will not discharge a round which is in the chamber.

(Testimony of Lowell W. Bradford.)

Q. How do you know that?

A. By testing it with a cartridge case in there with the primer intact.

Q. Now, similarly, Mr. Bradford, if the hammer is pulled back, the safety is moved from fire all the way to safe, and the hammer will drop again?

A. Correct.

Q. Will this fire the gun?

A. This will not fire the gun.

Q. And you tested this in the same fashion?

A. Similarly, yes.

Q. Now, I think you have told us, Mr. Bradford, that immediately after loading, the gun would be in a position with the hammer fully back and the safety on fire?

A. Yes. I have the bolt retracted now.

Q. Yes. A. Want me to drop that? [222]

Q. If you will, please. Now we can move the safety forward, put the gun on safe, is that right?

A. Yes.

Q. Fire at safe. Now, what must be done to move the safety into firing position?

A. In order to put the safety in the firing position, it's necessary to retract the safety back to a point where it is opposite the hammer, and see if it shows on the indicator of the safety mechanism.

Q. You are indicating the safety in the full fire position? A. Yes.

Q. Does this take a substantial pull, Mr. Bradford? A. Yes, it does.

(Testimony of Lowell W. Bradford.)

Q. Did you determine how much of a pull it took? A. I did.

Q. And would you tell us, please?

A. This required a minimum of 26 ounces and sometimes as much as 60 ounces. In terms of pounds——

The Court: 22 ounces to 60 ounces?

The Witness: 22 to 60.

Q. (By Mr. Murray): And in terms of pounds?

A. In terms of pounds, at 16 ounces a pound, this would be as little as one pound ten ounces and as much as three pounds twelve ounces.

Q. Is this a normal action for a gun of this sort? [223] A. Yes.

Q. Mr. Bradford, could the safety be moved from the safe to the fire position by pulling the trigger of the gun?

The Court: You mean by cocking the gun? Oh. By pulling the trigger. I see what you mean.

Mr. Murray: Yes, your Honor.

The Witness: May I have that question again?

Q. (By Mr. Murray): Assume that the safety is on safe. Can the safety be moved from the safe to the fire, and the hammer back—can the safety be—we can't do that, can we? Can it be moved from safe to fire position by pulling the trigger?

The Court: Talking about the safety?

Q. (By Mr. Murray): The safety.

A. No. No, it can't.

Q. Why is that?

A. That's because of the way the gun is designed.

(Testimony of Lowell W. Bradford.)

The Court: Well, the trigger has nothing to do with the safety; isn't that the point?

The Witness: Well——

The Court: I mean with operating the safety mechanism.

The Witness: I'm not sure I have the question straight, I guess.

Q. (By Mr. Murray): Well, by pulling the trigger, Mr. Bradford, is it possible to move the safety from safe to fire? [224]

A. No, it isn't.

The Court: Well, unless you deliberately move it with some other part of the hand other than the trigger finger.

Mr. Murray: That's right, your Honor.

The Court: That's what you mean, isn't it? In other words, just by pulling the trigger, the safety mechanism will not go from an on safe position to a fire position?

Mr. Murray: That's right, your Honor.

The Court: And in that respect the trigger isn't even connected with the safety mechanism, is it?

The Witness: No, sir.

The Court: As I understand it, this safety mechanism interposes something between the hammer of the gun and the firing pin?

The Witness: That's correct.

Q. (By Mr. Murray): Mr. Bradford, I show you a photograph entitled "Defendant's Exhibit B-6," which is in evidence, and I ask you if you have ever seen that photograph before or a similar

(Testimony of Lowell W. Bradford.)

photograph? A. Yes, I have.

Q. Have you looked at the photograph with a view to determining the position of the mechanism of the gun shown there? A. I have.

Q. Now, Mr. Bradford, assuming that this photograph shows the gun which is on the table there before you, are you able [225] to determine the position of the hammer?

A. I have an opinion concerning it, yes.

Q. What is your opinion?

A. It's my opinion that this photograph shows the relative position of the safety and hammer as I have them pictured in Photograph No. C-1. In other words, the full fire position of both hammer and safety.

Q. The hammer is fully back and the safety is on fire? A. Yes.

The Court: Well, this would be the normal position for this gun if a shot had just been fired from it?

The Witness: Precisely.

Q. (By Mr. Murray): Now, Mr. Bradford, you heard some testimony in here today about—I wonder if you could put the slide in again, please? You heard some testimony here today about making a hammer click in various sorts of fashions, either by fanning the hammer with one's thumb, or with the safety on fire, pushing it forward until the hammer comes home to this position, or with the safety on safe and pulling the trigger.

Now, in any of these circumstances, you have

(Testimony of Lowell W. Bradford.)

testified, I believe, that the gun would not discharge? A. That's correct.

Q. Is that correct? Because the safety always ends up on safe? [226] A. Yes, sir.

Q. Assuming, Mr. Bradford, that one were made—let's take these one by one. Now, assuming that one were doing the first of these acts, which would be, say, with the safety on safe and the hammer back, pulling the trigger; what would be necessary to do that repeatedly, make that same noise in the same fashion?

A. Well, one would have to retract the hammer and pull the trigger, the two operations involved.

Q. And you were just indicating the manner in which that could be done?

A. Yes. And I have just demonstrated the sequence.

Q. Could it be done with one hand, Mr. Bradford?

A. Well, I can do it. It's a little awkward, but it's possible. It is a rather strong spring on the hammer.

Q. Now, Mr. Bradford, in the next operation, which is with the hammer back and the safety on fire, by pushing the safety forward to the safe position, the hammer drops. What would have to be done to do that again in this fashion?

A. It would be necessary to retract the safety first, because the hammer will not stay in a cocked position unless the safety is retracted.

Q. Moving the safety to fire?

(Testimony of Lowell W. Bradford.)

A. Yes. In other words, it would be the operation first of moving the safety back, second of cocking the hammer, and, [227] third, of pushing again forward on the safety mechanism.

Q. Mr. Bradford, the last device we talked about, I believe, was moving the hammer back and letting it come forward. Now, what would have to be done to do that?

A. In this, starting out from what would be my position, now, C-3 in the photograph, one would have to thumb the hammer either with the right hand or with the left hand, and would either have to maintain the safety in a full forward position, in which case the hammer will not stay cocked, or would have to cock it less than the full position, at which time it would drop under spring action. When the hammer is pulled in this position more than once, the safety is pulled back to a position where it will maintain a cocked position on the second try.

Q. Now, Mr. Bradford, in this first experiment we have performed here, which is with the safety on safe, pulling the trigger, you have said that the gun would not discharge in this way?

A. Yes.

Q. Is that right? A. That's right.

Q. Would it be a prudent thing to do, Mr. Bradford, in your experience, for a man experienced with guns to load the gun, point it to his head, and attempt this experiment?

A. I would consider it to be very imprudent.

Q. Would it be a dangerous thing to do?

(Testimony of Lowell W. Bradford.)

A. In my opinion it is, yes. [228]

Q. What about experiment No. 2 with the gun, with the firing mechanism on fire, the hammer back, pushing the safety forward until the hammer clicks? Do you think that would be a prudent thing to do? A. You mean pointed at someone?

Q. For a man experienced with guns to load the gun, point it at his head and perform this experiment?

A. No, I think it would be very dangerous and imprudent.

Q. And how about situation 3, with the hammer?

A. Same thing.

Q. Mr. Bradford, based upon your experience with guns and upon your expert knowledge of weapons, would it be prudent under any circumstances for a man familiar with the operation of guns to point this gun in a loaded condition at his head and either pull the trigger or perform any one of these experiments we have just talked about?

A. No, I think it would be very imprudent to point a loaded weapon any time at oneself or at another person.

Q. What if the man thought the safety was on?

A. It wouldn't make any difference.

Q. It would still be a dangerous thing to do?

A. The concept of safety of firearms is not to point them unless you expect to shoot.

Mr. Murray: That's all I have from Mr. Bradford, your Honor. [229]

The Court: Cross-examination.

(Testimony of Lowell W. Bradford.)

Cross-Examination

By Mr. Decker:

Q. Mr. Bradford, to point that gun at another individual or at oneself, whether it is on safe or not on safe, or whether it is loaded or unloaded, is not good practice, is it?

A. That's correct.

Q. Violates one of the cardinal rules of safety in the handling of firearms?

A. Indeed it does.

Q. Now, Mr. Bradford, I notice that when you pulled the safety mechanism back—would you mind releasing the slide? When you pulled the safety mechanism back, you did it with your left hand?

A. Yes, sir.

Q. That, I take it, is the proper way to maneuver the safety mechanism, with the left hand?

A. Well, as to what's proper, I think it is a matter of habit or strength or ability. The safety can actually be manipulated with either right or left hand with equal facility by me.

Q. Supposing that you have the gun in a firing position and you wish to put it on safe. Now, it was in that position, I noted, when you, in putting it on safe, used your left hand. That would be the way you would do it, would it not? [230]

A. Well, I hadn't given it any thought. I think it's a little easier for me to do it that way, yes.

Q. Isn't it also a fact, sir, that—well, let's put the gun in a position with the hammer down, that

(Testimony of Lowell W. Bradford.)

is, fire the gun. That's right. Now, if you wish to cock the gun and then put it on safe, what would be the way you would do it?

A. My normal way would be to use the left hand to cock the hammer, because the hammer does have a very stiff pull back to it. And then I would put the safety on with the same thumb, because it's there at the end of the hammer retraction.

The Court: Isn't it already on safe when the hammer is retracted?

The Witness: No, the way that I did it, that particular time, I retracted the hammer with the safety in the fire position.

The Court: I understand that, but if the safety is in safe position and you retract the hammer, in other words, you cock the gun, without moving the safety lever, or the safety mechanism, it still stays in a safe position?

The Witness: Yes, sir; that's correct.

Q. (By Mr. Decker): All right. Now, do you consider that a safer way of handling the gun than to use your right thumb for the purpose of maneuvering the safety lever?

A. Oh, I don't think there's any particular difference as far as the safety part of it is concerned, except that I have a [231] firmer grip on my right hand if I use the left, and if I use the right hand to retract the hammer, I have to release part of my grip, which doesn't give me as good a control. But from a theoretical point, whether or not it will fire, it doesn't really make any difference.

(Testimony of Lowell W. Bradford.)

Q. All right. Now I think you testified, sir, with respect to these three different ways of making the clicking noise, that if you release the hammer with the trigger while the gun is on safe, it won't fire, and you could continue to do that by simply pulling back the hammer with your thumb and releasing it again with your finger, and you would continue to make this clicking noise and the gun would not fire so long as the gun stays on safe?

A. That's right.

Q. But there's a difference with respect to these other types of clicking noises. Let us assume that you were producing this clicking noise by moving the safety up into the safe position. Do you understand what I mean by that?

A. Do you mean——

Q. With the hammer back.

A. You mean this movement here?

Q. Yes. I don't think you pulled the trigger, did you?

A. No, I didn't. I pushed, from my photograph which shows position No. 2, to position 3.

Q. You caused the hammer to fall by moving the safety [232] lever from the firing position to the safe position?

A. Yes. And to define it exactly, in referring to my photographs, it would be from position 2 to position 3 by simply pushing on the safety, cocking the hammer.

Q. All right. Now the next step I want to discuss with you is, if one did this in sequence, pro-

(Testimony of Lowell W. Bradford.)

duced a series of clicks in this manner, what would be the motions one would have to make to produce a series of clicks in that manner without discharging the gun?

A. Well, assuming that we start from the position indicated by Photograph C-3, it would be necessary to cock the hammer, and then by simply manipulating the safety.

Q. To produce a click by manipulating the safety? A. Without pulling the trigger.

Q. Without pulling the trigger?

A. Then it's necessary to push on the serrated part of this safety mechanism, which is on the side facing the hammer, push it forward, and this causes the hammer to drop to the position indicated in my photograph, C-3, to that position.

Q. All right. Now——

The Court: I want you to repeat that.

Q. (By Mr. Decker): Would you please repeat the maneuver, make a series of clicks in that manner? A. (Complying.)

The Court: Just repeat the same maneuver.

Q. (By Mr. Decker): Safe position. You don't have to disturb the position of the safety mechanism more than just to push it forward a little bit as you have indicated?

A. On one of those I did. There are some times when the safety does not move back enough to enable the hammer to stay in a cocked position. There is a small movement to the safety—not more than about an eighth of an inch—and the safety must

(Testimony of Lowell W. Bradford.)

come back just slightly when the hammer is retracted. If it doesn't, it won't hold the hammer. Then this appears to be somewhat erratic.

Q. But if it does not hold the hammer and the hammer slips and falls the way it's done there, the gun still will not fire?

A. Still will not fire as long as the safety is pushed into safe position with the "S" showing. "S" is in the center.

Q. I see. Now going to the third way of producing the click, which was simply by pulling the safety back, the hammer back to a retracted position, and then releasing it before it's locked in that position to produce a series of clicks in this manner, what actual operation do you do with your hand?

A. Well, the operation here is simply to take one of the hands, right or left, it's easier for me with the left, thumb the hammer and simply release the thumb, which lets the hammer fall, as I am now doing.

Q. Now, did you say that when the safety mechanism is in [234] the firing position, the hammer will not stay cocked back?

A. If it's in the full forward position, I just pushed it forward, the hammer, when it is retracted, will not always catch. Sometimes it will. But if I demonstrate that by pushing forward on the safety when the weapon is in position 3 of my photograph and then retracting the hammer, and this time it stayed—it doesn't always stay—but by holding the safety forward, I can demonstrate that it will not always stay.

(Testimony of Lowell W. Bradford.)

Q. I see.

A. And this corresponds to the operation—and you observe with the firearm in the fully cocked position and starting out with the weapon as indicated in Photograph 2, if I pass a certain point, the hammer will drop. Now logically if the safety is forward of that position, the hammer is not going to stay back. If it's back to that position, it will stay in a cocked position.

Q. Well, then, let me put this supposition to you. Supposing that this clicking noise was being produced by moving the safety mechanism all the way from the firing position forward to the position where the hammer is released. You see what I mean by that? I know it is not necessary, but let's assume that it was being done that way.

A. Yes, I see. You are referring now to starting out with position 3 as indicated by the photographs, and then [235] retracting the safety without touching the hammer.

Q. Let's assume we have the safety clear back in a firing position.

The Court: And the trigger cocked.

Q. (By Mr. Decker, continuing): And now we cock the gun, and now we produce the clicking noise by moving the safety forward to the point where the hammer is released. That will not fire, will it?

A. It will not.

Q. Now, if we do this sequence again?

A. Retract the safety from position 3 to position 1, according to the photographs. I retract the ham-

(Testimony of Lowell W. Bradford.)

mer from position 3 to photograph position No. 1, and then push the safety to position 2 according to the photograph, and then past 2 so we again resume position 3.

Q. Right. Now, wouldn't it be entirely conceivable for a man who has been producing the clicking noises in this manner, who has perhaps had one or two drinks of alcohol, so that his blood content is .14 per cent—you are familiar with that, I take it?

A. I am.

Q. 0.14. Would it not be conceivable that this man, who has been producing the clicking noise in that fashion, might very well forget and pull the trigger to produce the clicking noise instead of moving the safety forward? You see what I [236] am getting at?

A. I am not sure I followed the position of the gun.

Q. All right. Let's put the position of the gun with the safety in the firing position.

A. This is my photographic illustration 1, is it?

Q. Yes. Here's a man who has been causing the gun to snap but not discharge, a fully loaded gun, by moving the safety forward, as we have been doing, and then pulling it back and putting the hammer in the cocked position as it is now. Now if this man has had enough to drink so that he has 0.14 blood alcohol content, it would not be inconceivable at all, would it, for him to forget and pull the trigger in order to produce the clicking noise?

(Testimony of Lowell W. Bradford.)

A. Oh, you mean actually firing the gun by pulling the trigger in the normal manner of firing?

Q. That's right.

A. I don't know that I could answer that as to what would be conceivable.

Q. What would happen, though, if he should forget and pull the trigger?

A. Well, of course, if I pull the trigger, the gun would fire if there were a round in the chamber.

Mr. Decker: Thank you, Mr. Bradford.

The Court: Essentially, your other question was an argument, and one that you should address to me, not to him. [237] The result of what would happen is an appropriate question. Your other question was argumentative.

Mr. Murray: I have no redirect examination.

The Court: Well, that concludes your questioning, Mr. Decker?

Mr. Decker: No, your Honor.

Q. Just one sort of thing I am curious about, Mr. Bradford. How can there be a variation of more than two pounds in the amount of tension which you find is required to energize the—or to pull back that safety mechanism?

A. Well, first of all, it is an experimental fact and not uncommon. The things that I think are responsible for it are the way in which the moving parts that rub together lock each other—are finished. If they are finished accurately, usually there's a crisp give away at the right tension. If they are not finished off accurately, then we find variations.

(Testimony of Lowell W. Bradford.)

At least this has been my experience with mechanical parts of firearms.

The Court: In any event, it is normal to have variations?

The Witness: Yes, sir.

The Court: In moving parts of firearms, tension that's necessary to move it?

The Witness: Yes. As a matter of fact, this trigger [238] pull variation is much less than ordinary variations which I find.

Q. (By Mr. Decker): All right, sir, now one other thing. You have indicated, and I think it shows on your photograph, C-3, that with the safety lever in the safe position, the hammer does not come forward all the way to the firing pin?

A. That's correct.

Q. A width there which has been described as a sixteenth of an inch, but in any case, there is a width there. Now does that width vary with the position of the safety lever as you approach the full firing position?

A. I can best determine it by observing it. Yes, it does. As the safety is retracted from this position indicated in photograph 3, when the safety approaches the fire position, the hammer, of course, is released by the safety and it draws nearer to the firing pin.

Q. So you would say that the farther back the safety mechanism is toward the firing position, the more likely the gun is to discharge?

A. Well, in this position the hammer is not in

(Testimony of Lowell W. Bradford.)

a cocked position, so that in order to fire it, you would have to cock it and then pull the trigger.

Q. I understand that, sir.

A. I don't think you could say——

The Court: What Mr. Decker is saying is that with the [239] hammer in a cocked position, and if it then is released from the cocked position and the safety is just a little off of fire, that the distance between the released hammer and the firing pin would be less than that if it was on the full safe position.

The Witness: I don't think this reasoning would apply when you examine the gun in the hammer down position and try this safety actuation. I think in order to answer that question it's necessary to put the safety—put the hammer in a cocked position and then by successively trying the safety in different positions, you will find that there is a position where it will fire and a position where it won't fire. I don't think there's any tendency involved. I think it's a clean break-off point. I think that as long as this safety has the "F," meaning "fire," covered, why, the part that it goes under, that the weapon cannot be fired.

Q. (By Mr. Decker): But that is a position which is somewhat short of the full safe position, isn't it?

The Court: You mean of a full fire position?

Q. (By Mr. Decker): Full fire position?

A. Yes, that's what I said. Until you get the "F" well out from under its covered position—I

(Testimony of Lowell W. Bradford.)

have it now so that the "F" shows and the gun will still not fire. And until I pull it back to the point where it clicks into position, it will not fire. So that there actually is some time after the [240] "F" is exposed where it will not fire.

Q. You are using the word "fire" to mean that the hammer will not release when you pull the trigger? A. Yes.

Q. Let's assume we released the hammer by inadvertently dropping it while we are pulling it back with our thumb.

A. Well, let's see how that works by trial. No, even with the "F" exposed, it seems like, by trial and experiment here, that with the "F" exposed and still retracting the hammer and letting it drop inadvertently, it still will not contact the firing pin. You can determine this by starting out from a position——

Q. You are just making a visual observation now?

A. Yes, that's right. You can actually see what the hammer does.

Mr. Decker: I think that's all. Thank you, Mr. Bradford.

The Court: Any redirect examination?

Mr. Murray: No, your Honor.

(Witness excused.)

The Court: Would you get the—that which is in evidence, Mr. Clerk? Now, does the defense rest at this time?

Mr. Murray: Just a moment, your Honor.

The Court: Yes.

Mr. Murray: Let me examine the exhibits here, if I may.

The Court: You may. There's only one exhibit that's [241] not in evidence. That is Exhibit 5, Mrs. Harrington's statement, and you have read into evidence one portion of this, Mr.—

Mr. Murray: Yes, that's right, your Honor.

The Court: Other than that, there are no other exhibits that have been offered which have not been admitted in evidence. There have been some that are admitted subject to objection and subsequent motion to strike, but they are in evidence.

Mr. Murray: The defense rests, your Honor.

The Court: Any rebuttal?

Mr. Decker: No, your Honor, there's no rebuttal. The only problem we have remaining is the question of the proof of the letter or its contents referred to earlier in the afternoon. I would like to be permitted by the Court to submit the matter now with the right perhaps, pursuant to stipulation, to reopen for that limited purpose.

The Court: Well, you have the right to do it already without further—I am not ready to submit the matter in terms of actual submission, because I want to know what you want to do about argument.

Mr. Decker: Well, I meant——

The Court: You will conclude the evidence subject to the right to——

Mr. Decker: That's what I meant. I am sorry, your Honor. [242]

The Court: Well, I am not being semantical about it. I just want the record to be accurate. What do you gentlemen want to do about argument in this matter? You can't argue it now. I am talking about——

Now, do you want to orally argue it, and if you do, do you want to first develop any memoranda or authorities as to your positions? Mr. Murray has already some authorities cited for his position and he says that I should dismiss this action on the grounds that the evidence is insufficient.

Mr. Decker: And I have my authorities contrariwise already submitted to you, too, your Honor.

The Court: You think from an authority point of view that the authorities that are applicable to this kind of case have been set forth in our trial briefs?

Mr. Decker: Yes, I do.

Mr. Murray: I think so, your Honor.

The Court: All right, then, do you want to orally argue the matter?

Mr. Murray: Yes, your Honor, I would like to.

The Court: Do you want to, Mr. Decker? When can you be available to argue it orally? Can you do it tomorrow morning?

Mr. Decker: That's satisfactory with me.

The Court: You will have to do it after I get through a criminal calendar, but—— [243]

Mr. Decker: 11:00 o'clock?

The Court: I think 11:00 o'clock would be satisfactory.

Mr. Decker: Fine.

The Court: We are ready to argue at 11:00.

All right, then, we will hear you at 11:00 o'clock tomorrow morning.

Mr. Murray: Thank you, your Honor.

Mr. Decker: Thank you, Judge.

The Court: All right, then, Court will be at recess.

(A recess was taken until Wednesday, March 22, 1961, at 11:00 o'clock a.m.) [244]

Wednesday, March 22, 1961—11:00 o'Clock

The Court: Gentlemen, this is the time for argument. I know we are starting at a late hour. I think it would be wise, however—Do you think this would be argued within an hour? Do you think it would be wise to proceed and dispose of it in the morning, and then take a recess? From my point of view, I would prefer to go on through, but if you have other engagements, we can put it over. Which would you prefer?

Mr. Decker: I would prefer to go through.

Mr. Murray: I would, too, Your Honor.

The Court: All right. Would you proceed, Mr. Decker, and make the opening argument on behalf of the plaintiff?

Oh, by the way, the case I was referring to which had this accidental death is the case reported as the case of Ruth B. Ziegler versus the Equitable

Life Assurance Society of the United States. And it is a Seventh Circuit case decided December 7, 1960, and is reported in Volume 284 Fed. 2d, page 661. Now, this involves the case of whether or not it was an accidental death when a man who was undergoing diagnostic treatment for a mental condition and was in a hospital and went through a heavy plate glass window—the question whether he did that mistakenly trying to find an exit and, therefore, accidentally, or whether he did it as a result of unsound mind or deliberately as a suicide. They held that was a question for [245] the jury and sustained the verdict in favor of the plaintiff.

It covers some of the cases on the question of what is accidental and what is not. It was not without a division; it was a divided court, Judge Schnackenberg dissenting.

No, I am sorry. It is reversed on the presumption of an instruction that was given.

Mr. Decker: Presumption against suicide instruction.

The Court: But it held that the question was one of fact for the jury under the circumstances. I don't know that that helps us too much, but it is one of the recent federal cases on the subject.

Mr. Decker: Thank you, Your Honor.

I think preliminarily you will recall that the evidence was closed in this case yesterday afternoon but with the plaintiff having the right to introduce a letter written to Mrs. Harrington by the New York Life Insurance Company.

The Court: Yes.

Mr. Decker: Counsel has provided me with a photostatic copy of that letter.

The Court: Do you have any objection?

Mr. Murray: No, Your Honor.

The Court: It will be admitted as the plaintiff's next in order.

The Clerk: Plaintiff's No. 7.

(Letter from New York Life to Mrs. Harrington was received in evidence as Plaintiff's Exhibit 7.) [246]

The Court: What is the date of that letter?

The Clerk: Dated May 3, 1960.

The Court: It is in evidence. Now the evidence is closed.

Mr. Decker: That is correct, Your Honor.

The Court: You may proceed.

Closing Argument on Behalf of Plaintiff

Mr. Decker: May it please the Court, the contracts of insurance which we are concerned with in this case contain a double indemnity provision which provides that the double indemnity benefits shall be paid upon due proof that the death of the insured resulted, directly and independently of all other causes, from accidental bodily injury.

Now, preliminarily, to clarify the issues before the Court, I would point out that it surely is undisputed in the evidence that the death of Arnold Harrington was caused by the injury, that the injury was the sole cause of death. So we do not have

any proximate cause problems to concern ourselves with here. And we are able to restrict our concern to the question as to whether or not the injury which Arnold Harrington inflicted upon himself was accidental bodily injury within the meaning of the contract.

The Court: All right. Now, Mr. Decker, in the hopes that I may shorten argument, I think that it is proper at this time for me to indicate to you my impression, my present [247] impression, of the factual situation here, which I think I can do in a very few words. I would like to have you argue this question of whether the death was accidental under the impression of the facts I have.

I do not want to preclude you from disagreeing with my impression but I think I may shorten it when I say to you it is my impression the death here was brought about by the gunshot wound which was self-inflicted by the insured, Mr. Harrington, and that this was done unintentionally and that it was not done by reason of any intention to commit suicide. I have this impression because all of the evidentiary facts that would show any motive toward suicide are negligible, and in that respect I would then say that under the state of the evidence I must conclude that the preponderance of the evidence indicates that the gunshot wound was unintentional.

Mr. Decker: Thank you, Your Honor.

The Court: Now, I would go further. That it was caused by a dangerous, hazardous, negligent act

on the part of the deceased by pointing the gun at his head when it was loaded and he knew it was loaded, but that it was done without any intention on his part of producing the gunshot which caused his death. But when he did what was—he brought about his death by a self-inflicted wound in carrying out a dangerous, hazardous and negligent conduct on his part.

Now, under that factual situation, I would like you to [248] argue to me your idea of the law as to whether or not this is accidental or whether it falls within the other provisions that are set forth in the policy—as I take it, the policy excludes anything but an accidental death—or to put it another way in the affirmative, it has to be established that the act which caused the death was accidental.

Mr. Decker: That is right. I agree with that.

The Court: Now, I rule out the specific exclusion of suicide, mental condition, or anything of that sort. The evidence, I think, is all negative there. And, as a matter of fact, all the motivating forces otherwise would indicate that this was not done intentionally, that is, that the act was not done with the intention of taking his life.

Mr. Decker: All right.

The Court: So, you come to the question: Is the performance of a dangerous, hazardous, negligent act which does produce death one that would either make it accidental or nonaccidental?

Mr. Decker: All right, Your Honor. I have spent some time trying to analyze this problem and have outlined it in argument which is directed to

exactly this point. I would like to skip that portion of the argument in which I had intended to urge upon the Court that the evidence was clear that there was no suicide here.

The Court: Yes. [249]

Mr. Decker: As you have already indicated, as even counsel for defense has indicated, the primary facts which we are concerned with here are substantially undisputed. The dispute arises over the inferences, the ultimate fact which the Court is going to be required to draw from those primary facts. And this leads us then to the problem that in order to draw the ultimate inference we must ascertain what the law says is the test which separates accidental bodily injury from nonaccidental bodily injury or some other type. In other words, what does the law say is an accidental bodily injury as it is used in this contract of insurance?

The Court: And I think I would like to have you sharpen it just a little further in this respect: What does California law say that it was? And if there is no direct California authorities, then what would be persuasive? I think one of my problems here is perhaps to determine what would the Supreme Court of California hold under a similar set of facts? As far as I know, there are no directly applicable California cases on the facts.

Mr. Decker: There is no case on the nose, as it were, Your Honor.

In analyzing this, what I would like to do is pose the view the defense takes as to what the law says the test is and the view that the plaintiff takes. The

defendant, in effect, urges to the Court that if the injury resulted from a voluntary [250] action, the natural and probable consequences of which was the injury which in fact occurred, then the injury may not be deemed to be accidental within the meaning of the policy. And the defendant cites in support of this proposition two California cases, the Postler case and the Price case, and one Northern District of California case, the Eraldi case, and then a series of decisions from other jurisdictions.

The plaintiff's position is that the law applicable here, the test which is imposed by the law, is just this: Did Mr. Harrington, in fact, anticipate, expect, foresee, or intend that the conduct which he engaged in would result in the injury which he incurred? This, it seems to me, is the divergence between the positions as to the applicable law.

Now, the plaintiff relies, in asserting that this is the test, upon a long line of California cases commencing with the leading Rock case which is cited in the plaintiff's memorandum and followed by a whole series of cases, the Rooney case and others up to and including Zuckerman, which is the last Supreme Court case in this area (a 1954 decision), and including also a District Court of Appeals case, the Davilla case. All of these are cited in the plaintiff's memorandum.

Now, the significance of these decisions, I urge upon the Court, is this: In every one of them the Appellate Court had before it an insurance contract which provided that the double indemnity benefit, or whatever benefit was being sought, [251] would

be payable if death resulted from violent, extraordinary and accidental means. And I am going to refer to these cases in my argument as the accidental means cases. In every one of these decisions the courts distinguished between the degree of proof required by the plaintiff where the policy reads "accidental means" as opposed to the degree of proof required in situations where the policy insured against accidental result. A distinction is clearly pointed out in all of these decisions.

Now, it is also true that in all of these decisions the Court was dealing with an accidental-means policy. None of them are accidental-result policies, and my research has disclosed no California decision which would be a case on the nose, because I can find no California decision where the Court applies the greater degree of proof as indicated is the proper degree of proof in the accidental-means case to a policy which does not provide for a recovery on accidental means, if Your Honor follows me.

The Court: I think I follow you.

Mr. Decker: It is not an easy thing for me to explain.

The Court: I don't think it is easy for the Courts to explain, either.

Mr. Decker: But the distinction is important. The language which says in an accidental means case the plaintiff must prove that there was some element of unexpectedness or unforeseeability in the means which led to the result—The [252] Court, in effect, says this is not an accidental result case and, therefore, the plaintiff has to prove more here, you

see. He has to prove something about the means rather than just the result. All of those cases you could say, I suppose, that the talk of the amount of proof required in accidental result cases is dicta. But, nonetheless, it is there, a distinction clearly recognized by a whole series of California authorities.

Now, interestingly enough, there is a case by the District Court of Appeals—this is the Ritchie case, *Ritchie versus Anchor Casualty Company*. Now, the facts are a little different here but the policy did provide for liability by the insurer in the event of accidental result as opposed to accidental means. There was no accidental means language in the policy. And in that case the District Court of Appeals—it is a fairly recent case—points out that all that is necessary in this type of case for the plaintiff to show is an unexpected and unforeseeable result of a voluntary act. The language of the Court is: “As we deal only with an ‘accident policy,’ the unexpected and unforeseeable result of a voluntary act fulfils the term of the policy as to the event covered thereby.”

The Court: Now, “unexpected” by whom? That is, unexpected by the person performing the act or unexpected by a reasonable man test?

Mr. Decker: This the District Court of Appeals, like all the other courts in the decisions I have read in this area, [253] failed to elucidate on. I think the only light on this is the use of the word “unforeseeable” rather than “unforeseen.” This, it seems to

me, would indicate that the writer of that opinion was thinking of some sort of objective test.

The Court: In other words, what the reasonably prudent person could or could not foresee would result from that act?

Mr. Decker: Yes.

The Court: As a voluntary act but which was done not with the intention of producing a bad result?

Mr. Decker: Yes, sir.

Now, to the extent that this would indicate the Court is thinking about an objective test, that is, a reasonable man test or something of that sort, and not concerning itself with what the state of mind of the doer is, that conflicts with the language of the long line of decisions I have researched, where the language indicates the Court is thinking of what the actor had in mind at the time. But I think this seems to be the law which we can find in the California cases on this question.

The following reasons are advanced to the Court by plaintiff to support our contention that the defendant is wrong in its position, that is, that if the insured voluntarily exposed himself to a risk which was great, that the natural and probable consequences thereof would be the injury that he sustained, then this is not accidental. The reason I think the [254] defendant is wrong in this position is as follows: In the first place, all of the cases relied upon by the defendant, so far as I am able to ascertain, are accidental means cases. Now, the insurance company in this case has chosen not to use the words

“accidental means” in its policies. And it has done that in the face of a long series of decisions going way back to the early twentieth century which say there is a difference between the amount of proof required by the plaintiff in an accidental means case as opposed to an accidental result case.

It would seem to me that referring to the usual rule that if there is ambiguity in an insurance contract, it is to be resolved against the insurer, that this is Point 1 which the Court might assert as being a defect in the defendant’s position here.

Now, Point 2, and perhaps more important: Even if we assume, Your Honor, for the purpose of argument that this Court, in attempting to determine whether or not the ultimate fact here is accidental or nonaccidental, even if we assume that the test which the defense proposes is the proper one, the defense is still wrong in this case because that test says that this is no accident if Mr. Harrington voluntarily performed an act the natural and probable consequence of which is the injury which resulted. The plain fact is that Mr. Harrington voluntarily—Let me put it this way. The plain fact is Mr. Harrington did not voluntarily put a loaded gun to his head [255] and pull the trigger. This is the statement, by the way, which appears in the defendant’s statement of facts in its trial memorandum. “It is admitted that Mr. Harrington then put the gun to his right temple and pulled the trigger.” I guess that is what I have in mind, that statement in the brief that it is admitted that he put the loaded gun to his head and pulled the trigger. This

was not his voluntary act. His voluntary act, Your Honor, was to put a loaded gun, which he thought was on "safe" to his head and then either release the hammer or pull the trigger—release the hammer in some way. The point being that the word "voluntarily" is a term of art in these cases. And the inference to be drawn here is that if he did not commit suicide, then it is clear, I think the Court must find, that the gun was in the safe position when he put it to his head.

The Court: Or he thought it was.

Mr. Decker: That is correct. It is clear that he thought it was, because he was familiar with the gun. He had been snapping it. It hadn't been discharged, so if he didn't intend to take his life, the inference must be drawn that he thought the gun was on "safe." And this is supported by his statements immediately prior to the incident. So the voluntary act was not to point a loaded gun but to point a loaded gun, which he thought was on "safe," to his head.

The Court: I am willing to find the facts in accordance [256] with that statement: that he thought that the gun was on "safe," mistakenly thought that.

Mr. Decker: Yes. Now, with this finding of fact, then, even under the test imposed under the accidental means cases, which I claim are not applicable here because this is not an accidental means policy, but even under that test this was an accident. Let me refer to two cases, California cases——

The Court: Are they in your memorandum?

Mr. Decker: One of them is and the other is not. The first case, *Cox v. Prudential Insurance Company*, 172 Cal App 2d 624, which is in the memorandum, and is discussed there; and the other case is the case of *Stokes versus Police and Firemen's Insurance Association*, which is found at 109 Cal App 2d, Supplement 928, a decision by the Appellate Division of the Superior Court here in San Francisco.

Both of these are cases where the policy sued upon provided for recovery in the event of death occurring by reason of "extraordinary, violent and accidental means," and they both illustrate that if the conduct of the decedent, be it means or whatever you want to call it, the actions of the decedent which immediately preceded the injury or death contain an element of unexpected peril, something which he subjectively did not anticipate, then the death or injury which results is not death or injury by accidental means as that term is set forth in the policy. [257]

The Court: It is not? You say it is not accidental death in that situation?

Mr. Decker: It is accidental death. I mean it is death by accidental means.

Now, for example, in the *Stokes* case a San Francisco fireman was called in his regular course of duty to a fire and he undertook to carry out his duties. He voluntarily went into the building where the fire was raging and he handled hose and worked hard at trying to put out the fire. He became quite ill and later, I think four days later, died of a heart

attack. The Court pointed out that there were unexpected, hidden and unknown dangers occurring in that fire itself. The fire was one where there were explosions which took place or combustible materials in the building which created tremendous heat problems; and this, the Court said, was an unexpected element which Mr. Stokes did not anticipate which made his death an accidental death within the accidental clause of the policy.

Now, the reasoning leaves something to be desired——

The Court: You are talking to an old volunteer fireman who has had considerable experience sniffing smoke, and I know how unexpected things can occur when you have combustible materials. And this produces a strain of the heart. And you are talking to the former counsel for the California State Firemen's Association and a former Senator who was instrumental in having heart trouble and pneumonia added to the causes of [258] compensation. So I have heard this from the judicial and other aspects, and I have heard the experts in the field argue this question of heart trouble and pneumonia as part of the occupational hazards. I have heard this argued by experts pro and con, so when a fireman goes into a burning building, he goes into an unexpected situation.

Mr. Decker: I cite the case to show that the term "voluntary" is a term of art.

The Court: I am sure it is. "Voluntary" is a word of art.

Mr. Decker: Now, I think that is the test of the

defendant. I deny this is a test because I think the accidental means cases did not provide us with the test here but, nonetheless, I am arguing the case on their ground here.

The other case, the Cox case—In this case a young man was in custody and was being transported to another place of custody. He was in handcuffs seated in the back seat of the police car. He threw himself out of the car while the car was in motion going down a street in heavy traffic. He threw himself out of the back door of the car toward the side where the traffic was and he was observed by the witnesses who testified in the case to have fallen on his back and then to have come to a half-seated position and turned and looked over his shoulder to see traffic coming toward him. And at this point he made a mistake. He threw himself in the direction of a big [259] truck that was coming by inside of him the other way.

Now, here is a man obviously performing an act which one must say is highly imprudent and dangerous and, as a matter of fact, I think it would even fill the test that defendant urges here, that he should have foreseen that a highly probable consequence of this would be in being run over by a car coming along behind——

The Court: Either that or bounced on his head from going out of the moving car and suffering an injury that could kill him that way or seriously injure him.

Mr. Decker: All right. Now, of course this was

argued to the Appellate Court, but the Appellate Court pointed out that after he fell to the pavement, he sat up, indicating that he was all right that far, and then he looked—that the Court could not hold, as a matter of law—he had gotten a verdict below—the Court could not hold as a matter of law that going to his right instead of to his left was something that he should have anticipated would result in his death.

Now, I rely on it here to support my contention that the word “voluntary” is a California word and contains this element of unexpected or unforeseeable. If the element of unexpectedness or unforeseeability is there, then the result is accidental. And this is in an accidental means case.

The language of the Court which is helpful in this area is found in *Davilla v. Liberty Life*. “The injury is accidental—” [260] an accidental-means case again—“if, although the actor is doing what he intends to do, his course of action is interrupted by some unforeseen or unexpected happening.”

Now, in this case I contend that the unexpected happening or the unforeseen happening was the “safe” being in the “non-safe” or firing position instead of where he thought it was.

I think it can be said in both the *Cox* and the *Stokes* cases that the Court was seeking a way to overlook the technicalities of proof previously required. I think the tendencies of modern courts is to regard “accidental” as Mr. Justice Cardozo said in a dissenting opinion. He said, “If a death occurs in circumstances where it would commonly be re-

garded as an accident, it is an accident." This has been adopted in many states, though not in California. But in the Cox case the Court, though not adopting the rule directly, refers to it sympathetically and makes the implication that if it were necessary to adopt the rule, it would be adopted to sustain the verdict below.

To digress a moment, here we have a situation where the insurance company is out selling insurance with the language that "If your death results from accidental bodily injury," then it is only right and just and proper for the Court to say to such insurance companies, "You are telling people that if death results to them by reason of what the ordinary person would say was an accident, then your beneficiary is entitled to [261] double indemnity benefits." And I think it is quite proper and just for the Appellate Courts to hold the insurance companies to their promises and their obligations.

Now, I have already indicated to you why I believe the defendant's position is wrong. The cases relied on are distinguishable. They are all accidental means cases or they are extra California jurisdiction cases. I have already indicated to you that even if we assume that if the defendant is right that the test urged upon the Court by the defendant is the correct one, that on the facts of this case it still results in a plaintiff's verdict because Mr. Harrington's voluntary act was to put a loaded pistol to his head, thinking that the safe was on. And the fact that the safe was not on but was in the firing position is an unexpected, unanticipated element in the

case which makes the means test urged by the defendant inapplicable and results in this situation being deemed an accidental death.

Mr. Harrington exposed himself unanticipatingly to an unknown peril just as Mr. Cox did when he went to the right or Mr. Stokes did when he found hidden, unexpected dangers when he fought the fire.

I have nothing further to say here, unless you have some questions.

The Court: No, I think you have made your point very well. I have my impressions and you have argued very well. [262] The question is purely one of how you apply the law to the facts in this case in order to get the essence. This is the principal problem here. I think that as a federal judge I am in a first-impression situation factwise applying the law of the State of California. And therefore I must make an effort to determine what the court of last resort of the State of California would hold in a similar situation. This is the standard which I must follow.

Mr. Decker: Well, in that situation the *Zuckerman* case which is the last California Supreme Court case indicates the distinction. And the *Cox* and *Stokes* and *Ritchie* cases indicate that the California law would follow the rule urged by the plaintiff.

The Court: Well, I must attempt to search with great care what I would deem the California courts would hold in this situation. And you have argued this point very well, Mr. Decker, and you have argued it under the California law, which I think is

the California law. Other cases from other jurisdictions are not binding but may be persuasive.

Now, Mr. Murray, I would like to say to you that I have given you my impressions, as I have given them to Mr. Decker. You are not bound by my impressions, but I think my impressions are firm on this matter, namely, that I have ruled out suicide. It is my impression from the evidence that I would have to find, as to the facts in this situation, that Mr. Harrington pointed [263] the gun at his head with the thought or belief the safety was in a safe position. And by some means or other, whether by pulling the trigger or otherwise, caused the hammer to be activated against the firing pin, and when the gun was not, in fact, on the safe position and thereby caused the gunshot which produced his death.

These are my impressions and I have to do this by inference. But I infer from the facts that I think that these are the basic facts on which I have to make my decision; and while you may or may not have some other notion of the facts, I would at least require you to argue that aspect of the facts. You may argue otherwise, but you have to attempt to persuade me that my assumptions or impressions are in error. I wanted to get it narrowed down, if I could.

Mr. Murray: Your Honor, I am quite prepared to argue the case on this basis, and I will be happy to do so.

Closing Argument on Behalf of Defendant

Mr. Murray: Your Honor, we think that on the undisputed facts the plaintiff's view of the case, which Your Honor to some extent appears to have accepted—we think that on the undisputed facts Mr. Harrington's actions were so inherently dangerous that death, when it occurred, was not accidental. We think this is clear from the California cases and we think it is clear from the other cases in other jurisdictions.

Now, as Your Honor knows, Mr. Harrington took a gun [264] which was fully loaded, as he knew, tampered with the safety mechanism or trigger, made a snapping sound with the hammer of the gun, did this for a period of minutes, and then pointed the gun to his head deliberately and either pulled the trigger or continued snapping the hammer.

Now, Your Honor, I find it difficult to conceive of anything more dangerous than this course of conduct, short of suicide, and Your Honor will agree that the conduct is hazardous.

The Court: Well, it is hazardous all right.

Mr. Murray: Now, Your Honor, I think it is clear that the cases show this is not an accidental death. But first I would like to clear away what I think is an irrelevant discussion of legal principles as raised by Mr. Decker. Your Honor, I don't think anything depends in a case such as this on whether the policy insures against accidental death or accidental means; nothing at all. Now, it is true that the policies have different clauses, accidental means and accidental death, and in some circumstances

these distinctions are relevant. But in circumstances such as these, where a man deliberately courts danger and does an act hazardous in the extreme and death results from that act, the courts make no distinction between accidental death and accidental means. The proof of this, Your Honor, is in the cases we cite: The Postler case, in California the leading case; the Price case; and the Eraldi case in this District. [265]

I would like for the moment to quote, Your Honor, from the language of the Postler case, quoted on page 5 of our brief. The Supreme Court of California says—in what is the only California case which is close to this case—“An effect which is the natural and probable consequence of an act or course of action is not an accident, nor is it produced by accidental means.”

The Court: Now, those probable consequence standards, are these based on the reasonable man test? In other words, are they an attempt to use the reasonable man as a standard by which we judge human conduct?

Mr. Murray: Yes, your Honor, I think the cases tend in this direction.

The Court: And not the subjective standard of what the person involved thought?

Mr. Murray: No, I think this is perfectly clear. Except for some dicta dealing with different types of situations, all of the cases that deal with this question talk in terms either of foreseeability or deliberately engaging in an act which a normal person would realize is highly dangerous.

The Court: Are you saying to me that whenever

a man knowingly participates in or carries out a dangerous or hazardous act, his death or injury therefrom is not accidental?

Mr. Murray: No, your Honor, I think there should be something more than that. I think it should be highly dangerous, [266] dangerous in the sense we all realize is shockingly dangerous. And also a needless act, no rational reason for it.

The Court: Oh, no, I am not talking about emergency actions. I am not getting into that argument. I am talking about the situation where you say a man does a needless—or do you want to use the term “grossly negligent”?

Mr. Murray: Well, I say needless when he performs an act needlessly which a prudent man recognizes is highly dangerous.

The Court: You wouldn't say that if he does dangerous work, that if death resulted, this wasn't an accidental death?

Mr. Murray: No, your Honor. That's why I think the fireman's case is of no point here.

The Court: I follow you then. Go ahead.

Mr. Murray: Your Honor, I have read the cases cited by Mr. Decker's brief and as I recall—I can run through them one by one—except the Cox case, none of them involve cases extremely hazardous, acts at all similar to this case. I don't suppose Mr. Decker would dispute that, and he cites them only for the purpose of distinguishing between the terminology “accidental death” and “accidental means.” And as I pointed out, the cases which deal with acts like this do not make this distinction.

Now, our cases. The first one is the Postler case, the leading California case—— [267]

The Court: It isn't your contention that the Postler case has been overruled?

Mr. Murray: But not in this respect.

The Court: You are firm in that position?

Mr. Murray: Oh, I certainly am. If I weren't, I wouldn't have cited it in my brief.

The Court: I know. You made a note that it has been overruled. Well, this is very good practice. I just wanted to be sure how firm you were.

Mr. Murray: The Postler case arose on these facts. Postler was a man who had lost money in a gambling club in the city of San Francisco. So he went out and got a gun and came back to the club to get his money with the threat of a gun. Well, he did get the money but on the way out he was killed in an exchange of shots. The Supreme Court of California reversed the judgment on a jury verdict on the grounds that since the death of Postler was an ordinary consequence of his act in coming in and getting the money with the gun—since this was the normal result to be expected, his death was not accidental. This is the leading case of California.

It follows the Price case decided a year before, which was not overruled in any respect.

And the same rule was followed in this court in the Eraldi case, cited on page 5 of our brief.

“Deceased engaged in an encounter under [268] such circumstances that he invited his adversary to mortal combat and either foresaw or should have foreseen that death or injury would result.”

Now, your Honor, these cases do not deal with aiming a gun at oneself, but I think in every other respect it is the same. The rule is, if a man puts himself in a predicament where death may reasonably result, the death is not accidental—and you will remember that the Postler case makes no distinction between accidental death and accidental means policies.

Now, other jurisdictions. *Ford vs. Standard Life Insurance Company*, cited on page 6 of our brief; this is a case where Ford was the assured, a member of a religious group in the South which held that snake bites would not hurt annointed members. Ford, assuming he would not be bitten, fondled a rattlesnake at a dinner and was subsequently bitten and came to his death. Now, the Court said:

“Was the death of the insured under the facts heretofore shown due to accident?

“We do not have a state of facts where one is bitten by a poisonous snake while walking through the woods or fields. The snake does not suddenly and without warning come on the insured and bite him. The insured of his own free will voluntarily handled the snake without any attempt to protect himself. Certainly this voluntary assumption of this risk is not accidental. [269] It was his own design. The misconception of the biblical command or language of the Bible would not excuse a person and allow him to profit thereby.”

The Court: If you would alter the facts a little, you might get into some problems here. Supposing you are a reptologist (sic) or a snake hunter, and

of course snake venom is very valuable, and I know people who hunt rattlesnakes and extract the venom. It is done by persons of skill and knowledge but accidents do occur though death very rarely occurs. Now, this is common practice with rattlesnakes. In those circumstances, doing a dangerous thing, but doing it because this is a practice common to it, had some purpose to it, I presume this would take it out of the facts of our present case?

Mr. Murray: Oh, surely, your Honor.

The Court: Now, this is the explanation you were trying to convey to me when I asked you that question?

Mr. Murray: Yes. And then taking all necessary and proper precautions that could be taken under the circumstances.

The Court: And this can be transposed——

Mr. Murray: We can transpose the facts to hunting. And I suppose the facts can be transposed to gun hunting.

The Court: Oh, yes.

Mr. Murray: Your Honor, I would like to talk now about two cases, both of them dealing with the use of guns and both of them, I think, being extremely close to this case. The first [270] of these is *Thompson vs. Prudential Insurance Company of America*. This is cited on page 6 of our brief. Thompson was a young man who had a revolver with circular chambers. He determined by experiment that if he put just one bullet in the revolver and spun the chambers, the bullet would end up

in the bottom chamber because of gravity. He tested this out and this is the way it worked. He placed a cartridge in one chamber and relying on this supposed circumstance, he spun the cylinder, revolved the chambers and pulled the trigger—and was killed.

The Court: You claim that parallels this case?

Mr. Murray: I think it is very close, your Honor. Now, the Court in that case affirmed a directed verdict for the defendant. And I would like to read one sentence: “One engaging in such a bizarre pastime with a lethal weapon, if he be compos mentis, knows that he is courting death or severe injury, and will be held to have intended such obvious and well-known results if he is killed or injured.”

I think the case is extremely close, your Honor. This chap relied upon a mistaken circumstance, pulled the trigger in the same fashion as Mr. Harrington relied on it being in a “safe” position. In both cases it is obvious the insured acted in an extremely hazardous and extremely reckless fashion.

Now, in these circumstances it is not accidental within the meaning of the policy.

The next case is *Baker vs. National Life and Accident [271] Insurance Company*, cited on page 7 of our brief. This is a case in which Baker invited some of his friends to shoot a two-by-five-inch pepper can off his head, invited the friend to shoot it off with a revolver from a distance of eight or ten feet. Now, just as the friend was squeezing the

trigger of the gun, the can started to fall from Baker's head, and Baker jerked his head up to maintain the can in the proper position. The friend was already squeezing the trigger so it was too late to stop, and Baker was killed.

Now, the Supreme Court of Tennessee affirmed a dismissal of the action on the ground that the insured should have foreseen that death or injury could result from his voluntary act. Later on the Court said:

"Death is not courted by accidental means if it is a natural and foreseeable result of a voluntary, though unusual and unnecessary act or course of conduct of the insured. Target practice with a pistol and with a pepper can sitting on the head of a human being as the target is neither a reasonable nor necessary avocation. One who volunteers his head for such an experience must anticipate injury, if he is a normal person."

It seems to me, your Honor, that the cases we cite in our brief—several of them are close, two being on all fours, your Honor, and in all those cases the Court either directed a verdict for the defendant or entered an involuntary dismissal [272] of plaintiff's action.

Now, I would like to talk for just a minute on two cases on which Mr. Decker relied in his argument.

The Court: The Cox and the Stokes cases?

Mr. Murray: I think I have already discussed the Stokes case sufficiently. The difference in the

Stokes case was that the fireman was doing his duty, a normal course of activity.

The Court: I see the distinction there.

Mr. Murray: And I think that although the distinction is not so clear in the Cox case, the same distinction applies.

The Court: Let's see that one.

Mr. Murray: Now, in the Cox case, Cox was in the custody of police officers and, in an attempt to escape from death, pushed open the door and fell into the road. Now, the car was going 30 miles an hour and Cox, when he fell to the road, was not injured. At least there was no evidence of it. He sat up and looked about. Now, what Cox did as he looked about and saw there was traffic coming, and in an effort to escape his predicament and peril, he moved to the right to escape being run over. He moved the wrong direction and was run over by the traffic.

The analysis of the Court seemed to be something like this. The question was whether Cox had died from accidental means within the terms of the policy. Now, the Court said that [273] Cox's fall to the road did not result from accidental means because it was deliberate. And if he had been killed in the fall, that would have been the end of the case. The Court went on to say, however, that once he was in the road, Cox was faced with the situation where he felt he had to act to escape whatever peril he was in. Now, he made a mistake, but the Court held it was necessary to affirm the verdict of the trial court in favor of the plaintiff because the Court could not say as a matter of law that Cox,

in moving to his right, could reasonably have foreseen that he would be killed in the situation in which he was placed.

I don't see, then, where the Cox case has much to do with this case. Cox was trying to escape from a situation of peril whereas Mr. Harrington deliberately placed himself in a situation of peril.

The Court: Foolishly.

Mr. Murray: Yes, foolishly. I didn't use that word but I think that is absolutely true. Recklessly.

Now, on page 5 of his brief Mr. Decker quotes the Cox case:

"It cannot be said as a matter of law that Cox knew or reasonably could have anticipated that in going to his right he would be run over by the truck." Now, this is not very far from the rule we are urging upon the Court here. Perhaps Mr. Decker and I do not have a quarrel on [274] this. I think the answer must be clear.

The Court: What do you mean by the answer must be clear?

Mr. Murray: In this case it is very difficult to say that Mr. Harrington, in playing with the magazine of the gun, could not reasonably have foreseen that he might be killed. I think that inference is clear, that he could have been.

The Court: He either knew or should have known that he was doing a dangerous thing.

Mr. Murray: And I think that once you have decided that, that that is the answer of the case.

The Court: Well, I appreciate your argument, but I don't think——

Mr. Murray: Well, according to our view of the case.

One thing more about the Cox case. The Cox court, in reaching this decision, found it necessary not to overrule but to recognize and distinguish the very cases which we rely upon in this case. And I would like, if I may, to read you a sentence from the Cox case. This is on page 638, your Honor:

“Appellant cites several other cases in support of its contention that the death was not caused by accidental means. Those cases are factually distinguishable from the present case. It may be stated generally that in those cases the death was the direct result of the voluntary act of the insured (such as jumping from [275] a high building or the top of a moving train) and no act of an intervening agency was involved; or that the death resulted from performing a dare-devil stunt (such as handling a rattlesnake, playing Russian roulette or permitting a person to shoot at a can on the insured’s head); or that the death resulted from fighting with guns.” So I think, your Honor, it is clear that the authority of these cases has not been impeached in this Cox case. The last word of the California courts is the Postler case.

Now, your Honor, I am about to conclude and I would just like to say this. Mr. Decker has told us that what was unforeseen, according to Mr. Harrington, was that the safety was moved from “safe” to “firing.” Now, I think, your Honor, that the cases are clear that the question is not whether

Mr. Harrington foresaw it but whether a prudent person could have foreseen it.

But I want to talk a minute about that safety. It seems to us that the manner in which Mr. Harrington was fiddling with the gun underscores our position. Your Honor, it is dangerous enough to point a loaded gun at your head and pull the trigger relying on the safety mechanism, but to do that after monkeying around with the hammer and the safety so that you have no idea of what position it is in, and then pull the trigger—your Honor, this is hazardous in the extreme. It is difficult [276] to conceive of anything more hazardous than this.

The Court: All right. Thank you very much, Mr. Murray. You have made your point very well.

Now you may close, Mr. Decker.

Mr. Decker: Thank you, your Honor. I will be quite brief.

Rebuttal Argument in Behalf of Plaintiff

Mr. Decker: I think, your Honor, it is clear that there are situations where the courts have considered that it would be unreasonable to extend the risk which the insurance company wrote when it insured against accidental death or death resulting from accidental means to such situations as Russian roulette cases. It would be unreasonable to extend the risk on the insured to the handling of a poisonous snake, but nevertheless the courts have not dealt with this problem in such a way as to give us a very clear guide in handling cases on a case-to-case basis as to where that line is drawn.

As a matter of fact, in the cases which I have cited to the Court there appear statements by the writers of the opinions to the effect that each case must be decided on its individual facts. And it is obvious that the appellate courts are having considerable difficulty with this problem, particularly in view of the hopelessly involved mess they got themselves into when they started distinguishing between accidental means and accidental result. [277]

The rationale which I would offer to the Court for consideration—and let it be understood I am not abandoning my argument that the simple way to dispose of this case is to say this is not an accidental means case but an accidental result case, and the long series of California cases beginning with *Rock* have told us that all that is expected, if the provision is accidental result rather than accidental means, is that the result be unexpected or unforeseen. That is the simple way to dispose of this case and I think it would be correct on the basis of the California authorities. But I want to offer a rationale to the Court which would attempt to deal with this problem of there being some areas of risk where it is unreasonable to expect the insured to recover, such as the *Russian roulette* cases. And the key to this rationale is found in the language of one of the decisions relied on by counsel for the defense.

In the *Thompson* case, one of the south-of-the-Mason-Dixon-line courts relied upon here, the Court is discussing the young man who experimented and found that the cartridge would always come to

rest at the bottom, and it says this: "In such case, it will be presumed that the participant intended that he should be killed or injured should fate stop the cartridge in the spinning cylinder in firing position." He does more than simply a highly-dangerous thing; he does something else. He anticipates suggestively himself that, A, he [278] will not be killed; but, B, he will be killed if fate does not work out the way he is tampering with it, in effect.

Now, this would explain the result in the snake case. Here is a man who tempts fate. It would explain the result in the Postler case relied on so heavily by counsel. In the Postler case there was a gun fight and it may easily be said there that the real position of the Court was that this man, in engaging in armed warfare, anticipated that if he did not kill the other fellow, he would be killed himself. So as a matter of subjective intent or anticipation, it can honestly be said that he anticipated death or injury.

Now, Mr. Harrington's case is not this type of situation. Mr. Harrington, according to Mr. Chow, was thoroughly familiar with the way the safety mechanism on this gun worked. Mr. Harrington had been snapping the gun, although it was fully loaded, and it was not discharged—in other words, he was testing the efficacy of the safety mechanism.

The Court: At least he was certainly relying upon it.

Mr. Decker: And then he relied upon it to the tragic result which occurred. He was not anticipating that if the safety mechanism did not work

he would be killed. This was not in his mind. It could not have been. He was not gambling and tempting fate; he had tried out the safety mechanism and, according to Mr. Chow, he was thoroughly familiar with it. This, to me, is the distinction. He was not tempting fate in [279] the sense of saying, "Well, if it doesn't work, I will be dead." The fact of that safety mechanism not working was the last thing in his mind. So from the point of view of this rationale, there is the distinction between the hard cases which have made the bad law and this case.

The Court: Well, I don't know that they made bad law. They may be hard cases.

Mr. Decker: Well, it is pretty difficult to distinguish them on a rational basis. We have to distinguish them on a case-to-case basis. In the Cox decision, which counsel has just discussed with you, the Court doesn't say why the other cases are not applicable. It doesn't discuss the theory which the Court uses in the other cases. It just says they are not like this case.

So I offer this rationale to the Court as being the distinguishing thing. And, finally, the Postler case was a fight between two men armed with guns.

But then we come to the Rooney case cited in my memorandum, a California Supreme Court decision, if I am not mistaken. In any event, the assured in this fist fight was knocked to the ground and his skull was split open and he died. And this was held to be accidental within the meaning of the accidental means policy. Now, surely this man, in

embarking on a fist fight, was just as subject to censure as Mr. Murray said should be ascribed to Mr. Harrington here. His death was [280] accidental within the meaning of the accidental means policy.

So it is only the hard cases like the Postler case where a man engaged in armed warfare or lays down on a highway and waits for a car to run over him to show off to his friends, or engages in snake chucking, or engages in Russian roulette, that the Court says, "This is too much. We are not going to say the company needs to pay in this kind of thing."

Thank you.

The Court: All right. Thank you, gentlemen. You have both very ably argued one of these difficult questions of fact and law. The facts are not hard to infer; they are almost undisputed here. The parties might disagree with me as to what inferences should be drawn and might want to argue that I should draw one inference or another, but I think they come out pretty much as I have indicated.

And the points of law involved are stated in varying ways in many cases. The problem really is in making these points apply case by case, and this is one of those cases which has a very, very close problem in whether or not one principle should apply or another. And so it depends on the meaning of words and upon, I suppose, the weighing of the probabilities that have to be weighed in determining these questions.

And all I can say is I must review these cases. I haven't had a chance to study the case law as much as I would [281] have liked to. I think I have a good grasp of the facts. I have looked at the language of the policy and have read some of the cases. I think this I must do before I finally decide the matter. [282]

Friday, April 14, 1961

The Clerk: Harrington versus New York Life Insurance Company, for hearing on plaintiff's motion to amend complaint.

Mr. Decker: At this time, if the Court please, the plaintiff moves the Court for an order granting her leave to file an amendment to her complaint to conform to the evidence heretofore adduced at the trial and, additionally, for an order making findings of fact and conclusions of law on the issue of interest which was expressly left open in the Court's decision. I have heretofore deposited with the Court a copy of the amendment to the complaint which I propose and also a copy of the findings of fact and conclusions of law on the issue of interest which I propose and have served copies of the same upon counsel.

The motion is made on the ground that to allow the amendment would be in the interest of justice and consistent with the rules of the Court, and with respect to the proposed findings of fact and conclusion of law, the motion is made consistent with the authorities which I have cited on page 2 of the written motion filed with the Court.

The Court: Well, Mr. Decker, as I take it, the facts you are proposing to plead in the proposed amendment do conform to the proof insofar as it appears of record what was done. I understand there is no real dispute of fact here, but the [283] legal duties that flow or the legal liabilities that flow from this are really the matters in question.

Mr. Decker: That's correct.

The Court: If I were to conclude that you are not entitled to interest upon the circumstances mentioned here, I should deny your motion to amend because there is no issue. In other words, the real problem is what you propose to amend—is what you propose to add to the complaint by way of amendment and the proof that was offered, is it a material matter to be considered by the Court? And I would therefore like to hear your theory of it being permitted—of being entitled to interest as you claim you are from the date that there was a rejection of the claim.

Mr. Decker: Very well, your Honor.

The Court: Rather than from the date of the judgment.

Mr. Decker: Very well, your Honor.

The Court: I would like to hear you tell me that so that when Mr. Murray gets up to answer, he won't have to be wasting his time about what your theory of law is. This, in my opinion, is purely a question of law because the facts are undisputed.

Now, Mr. Murray, am I correct in that assertion that the basic fact, that is, the documentary evidence itself, as to when certain things were done, is undisputed?

Mr. Murray: There is no dispute, your Honor, about [284] these two documents upon which Mr. Decker relies.

The Court: The legal inferences to be drawn from it or legal conclusions to be drawn, of course, I understand there is a real argument about that.

Mr. Murray: I am not at all sure there is.

The Court: All right, then what is your position? Do you mean by that——

Mr. Murray: I am prepared to have your Honor enter your conclusions and findings of fact in accordance with the concession made by Mr. Decker. We do not oppose the amendment.

The Court: That answers it. The amendment—that is, the permission will be granted—the motion will be granted and the proposed amendment—now, do you have the original proposed amendment?

Mr. Decker: Yes, I do.

The Court: Now, Mr. Decker, will you file it?

(Counsel filing with the Court.)

Mr. Decker: I also have an order for your signature allowing me to file same.

The Court: That's what I want to know. Now, does this mean that perhaps—what about findings and conclusions now in this respect? Is this a matter that we are going to have to prepare findings and enter them or are findings in this respect going to be waived, in that respect, or do you want to go up and test this on appeal? [285]

Mr. Murray: No.

The Court: Well, all I want to do is have a record. Now, I have declared——

I want to ask you, Mr. Decker, and you, Mr. Murray, while you are here if you want some opportunity to propose additional findings or something of that sort, if you have a problem that you think I haven't found on. I think I have found on everything that was there and maybe more than was necessary. But, as I understand the rule, I held that my opinion or memorandum would constitute the findings and conclusions of the Court without further findings and conclusions. Have I left anything out?

Mr. Decker: No, your Honor. I have nothing further to propose.

The Court: I hesitate to take these cases away from counsel on findings, but in this case I thought it was so clearcut I didn't see anything that was missed. Now, from your point of view, if you think there should be additional findings that are material to frame the question, I would hear you, but I don't think there is anything additional. And insofar as the interest is concerned, if you waive findings, why, then we can have a judgment prepared and dispose of the matter very quickly. So that if you have further proceedings, you can have them.

Mr. Murray: We have no additional findings to propose at this time, your Honor. [286]

Mr. Decker: I think, your Honor, in view of the fact that you did expressly leave open the question of the finding on the issue of interest, that it might be appropriate for the Court to make a finding on that question, and I have the proposed find-

ings prepared and they have been submitted to counsel and he has indicated he has no objection to them.

The Court: All right.

Mr. Decker: So I will——

The Court: This is April 14th——

Mr. Murray: Your Honor, this is unnecessary, I would suppose, but I think the record should clearly show that our discussion today concerns only the question of propriety of the allowance of interest.

The Court: That's correct.

Mr. Murray: There is nothing in these findings by which we waive our position in regard to the findings, your Honor, upon the ultimate issue of liability.

The Court: The record will so show. If there is any way in which you want to have a written record to portray that, I will be perfectly happy to do that, to make such an entry, but I am sure Mr. Decker will not take any advantage of the situation.

Mr. Decker: No. So far as the plaintiff is concerned, the only thing that is before the Court today is the issue of interest. [287]

The Court: Interest. All right.

You will waive notice of the findings on this issue, will you not?

Mr. Murray: Yes, your Honor.

The Court: Then the findings will be entered. The findings of fact and conclusion of law on the issue of interest will be entered as of today.

Now, then, do you have a form of judgment or will you prepare a form of judgment for me, then?

Mr. Decker: I have one here this morning, your Honor.

The Court: Have you had a chance to examine it?

Mr. Murray: No.

Mr. Decker: I have not served it upon counsel.

The Court: Give counsel a chance to examine it. I don't mean you have to pass on it now, Mr. Murray. If you want time, I will give you that or whatever is necessary. Or if you can do it now, I will dispose of the matter. Here are the findings.

Mr. Murray: I think, your Honor, I would prefer to look at the judgment.

The Court: You may do so.

Mr. Murray: And examine it, on the understanding that if I find it is satisfactory, we can have your Honor sign it without a further hearing.

The Court: That's correct. That's the way. Have it [288] presented *ex parte* with your approval. You or counsel can advise me and I will sign it *ex parte*, because in this case there is no computation of money. This is all admitted. The only problem is the issue of law upon which the judgment is based and, as I say, this is a matter on which you, if you have any further proceedings, I want the record protected.

All right, gentlemen. If there is nothing further to come before the Court, we will recess.

[Endorsed]: Filed June 5, 1961. [289]

[Title of District Court and Cause.]

EXCERPT FROM DOCKET ENTRIES

1960

Aug. 29—Filed petition for removal from Superior Court, City and County of San Francisco, with complaint and summons.

Aug. 29—Filed bond on removal in sum, \$250.00.

Aug. 29—Filed cost bond of non-resident plaintiff.

Aug. 29—Filed notice by defendant of filing transcript on removal.

* * *

Oct. 11—Filed answer of defendant.

Oct. 13—Filed demand by plaintiff for jury trial.

Dec. 6—Filed notice & motion by plttf. to set, Dec. 12, 1960, with certificate of readiness.

* * *

Dec. 19—Ordered case for trial Feb. 20, 1961. (Harris.)

* * *

1961

Mar. 13—Ordered case for trial March 20, 1961. (Burke.)

Mar. 13—Filed deposition of Arnold Harrington.

Mar. 13—Filed deposition of Joyce A. Harrington.

* * *

Mar. 20—Ordered case assigned to Judge Carter for trial this date. (Burke.)

1961

- Mar. 20—Court trial. Jury waived, opening statements made, trial briefs ordered filed, and further trial continued to March 21, 1961. (Carter.)
- Mar. 21—Further court trial. Evidence and exhibits introduced and further trial continued to March 22, 1961. Motion of defendant to dismiss, submitted. (Carter.)
- Mar. 22—Further court trial. Arguments heard and case submitted. (Carter.)
- Mar. 31—Filed memo. opinion for plaintiff in amount claimed, subject to determination of question of interest. Opinion to serve as findings & conclusions. Prevailing counsel to prepare judgment. (Carter.)
- Mar. 31—Mailed copies to counsel.
- Apr. 3—Filed trial brief of N. Y. Life Ins. Co.
- Apr. 3—Filed memo. of plaintiff.
- Apr. 12—Filed stip. of counsel for hearing motion of plttf. to amend complaint, April 14, 1961, at 9:30 a.m.
- Apr. 12—Filed motion of plttf. for leave to amend complaint.
- Apr. 14—Ordered after hearing, motion to amend complaint granted and formal judgment submitted. (Carter.)
- Apr. 14—Filed order granting leave to file amended complaint. (Carter.)
- Apr. 14—Filed amendment to Complaint.
- Apr. 14—Filed findings of fact and conclusions of law on issue of interest. (Carter.)

1961

Apr. 21—Entered judgment—filed April 20, 1961—
for plaintiff v. New York Life Ins. Co.
in sum, \$15,000.00, with 7% interest from
Feb. 16, 1960, until paid, and costs.

Apr. 21—Mailed notices.

Apr. 24—Filed memo. of costs by plttf.

Apr. 26—Costs taxed, \$68.81. (Clerk.)

Apr. 28—Filed notice of appeal by N. Y. Life In-
surance Co.

Apr. 28—Filed supersedeas bond in sum, \$17,-
000.00. “* * * approved this 28th day of
April, 1961, to stand as a supersedeas
until the final determination of the ap-
peal. /s/ Oliver J. Carter, United States
District Judge.”

Apr. 28—Filed order that all proceedings for en-
forcement of judgment be stayed pending
determination of appeal and the coming
down to this Court of the mandate of the
U. S. Court of Appeals for the 9th Cir-
cuit. (Carter.)

* * *

May 18—Filed appellant's designation of record on
appeal.

June 5—Filed reporter's transcript of trial pro-
ceedings.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO
RECORD ON APPEAL

I, James P. Welsh, Clerk of the United States District Court for the Northern District of California, hereby certify the foregoing and accompanying documents and exhibits, listed below, are the originals filed in this Court in the above-entitled case and constitute the record on appeal herein as designated by counsel for the appellant:

Excerpt from Docket Entries.

Petition for Removal with copy of complaint and summons attached.

Removal Bond.

Bond for Costs of non-resident defendant.

Notice to Plaintiff of Filing Petition and Bond on Removal.

Certificate of Service and Filing to State Court and Plaintiff.

Stipulation and Order Extending Time for Defendant to Plead.

Stipulation and Order Extending Time for Defendant to Plead.

Answer of New York Life Insurance Company.

Demand by Plaintiff for Jury Trial.

Notice and Motion by Plaintiff to set for Jury Trial.

Stipulation and Order continuing motion to set.

Stipulation and Order continuing motion to set.

Notice by Defendant of filing Depositions of Joyce A. Harrington and Arnold Harrington.

Memorandum of Court for Judgment.

Stipulation for Hearing on Motion to Amend Complaint.

Motion of Plaintiff for Leave to Amend Complaint.

Order Granting Plaintiff Leave to Amend Complaint.

Amendment of Complaint.

Findings of Fact and Conclusions of Law on Issue of Interest.

Judgment.

Notice by Plaintiff of Taxing Costs, with Cost Bill attached.

Notice of Appeal by Defendant.

Order Granting Supersedeas.

Supersedeas Bond.

Certificate of Service of Order Granting Supersedeas.

Designation of Record on Appeal.

Deposition of Arnold Harrington (Plaintiff's Exhibit 6).

Deposition of Joyce A. Harrington.

Reporter's Transcript of Trial Proceedings.

Plaintiff's Exhibits 1, 2, 3, 4, 5 and 7.

Defendant's Exhibits A-1, A-2, A-3, A-4, B-1, B-2, B-3, B-4, B-5 and B-6, C-1, C-2 and C-3.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court this 7th day of June, 1961.

[Seal] JAMES P. WELSH,
Clerk;

By /s/ MARGARET P. BLAIR,
Deputy.

[Endorsed]: No. 17398. United States Court of Appeals for the Ninth Circuit. New York Life Insurance Company, a Corporation, Appellant, vs. Joyce A. Harrington, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed and Docketed June 7, 1961.

/s/ FRANK H. SCHMID,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 17398

NEW YORK LIFE INSURANCE COMPANY,
a Corporation,

Appellant,

vs.

JOYCE A. HARRINGTON,

Appellee.

STATEMENT OF POINTS UPON WHICH
APPELLANT INTENDS TO RELY

To Appellee Joyce A. Harrington and to Her Attorneys, Allan Brotsky and Charles W. Decker:

Pursuant to the provisions of Rule 17 (6) of the Rules of the Court of Appeals for the Ninth Circuit, appellant designates the following as the points upon which it intends to rely in this appeal:

(a) That the death of Arnold Harrington did not result directly and independently of all other causes from accidental bodily injury within the meaning of the double indemnity provisions of policies 25452964 and 26027201.

(b) That the District Court erred in its finding that at the time of his injury, Arnold Harrington thought that the safety lever of the gun with which he fired the fatal shot was in a safe position and that the gun would not fire in that condition.

(c) That the District Court erred in its finding that at the time of his injury, Arnold Harrington

thought that the gun with which he fired the fatal shot could be safely pointed at his head.

(d) That the District Court erred in its finding that the fact that the safety lever of the gun was in the fire position at the time of firing was a condition unknown to and unexpected by Arnold Harrington.

(e) That the District Court erred in its finding that Arnold Harrington had no intention to take his own life.

(f) That the District Court erred in its finding and conclusion that the death of Arnold Harrington did not result from suicide.

(g) That the District Court erred in its conclusion that the death of Arnold Harrington resulted directly from accidental bodily injury.

(h) That the District Court erred in applying an improper standard in determining the applicable substantive law upon the question whether the death of Arnold Harrington resulted directly and independently of all other causes from accidental bodily injury; and that, in that connection, the District Court failed and declined to follow decisions of the Supreme Court of California and other decisions which are directly controlling upon that question.

(i) That the District Court erred in applying an improper standard to determine the hazardousness of the conduct of Arnold Harrington by holding in that connection that the hazardousness of

such conduct is to be judged not by the objective standard of foreseeability to the ordinary prudent man, but by the subjective standard of the state of mind of Arnold Harrington.

(j) That the District Court erred in admitting into evidence, over appropriate objection, the self-serving and hearsay testimony of Mrs. Harrington concerning alleged statements of Arnold Harrington made immediately prior to his injury, including statements to the effect that Mrs. Harrington need not worry because the safety of the gun with which he fired the fatal shot was on safe and that Mr. Harrington would “prove” to her that it was on safe.

(k) That the District Court erred in admitting into evidence, over appropriate objection, the self-serving and hearsay opinions and conclusions of Mrs. Harrington concerning Arnold Harrington’s alleged display of annoyance immediately prior to the fatal shooting because of her alleged lack of confidence in him.

(l) That the District Court erred in admitting into evidence, over appropriate objection, the self-serving and hearsay opinions and conclusions of Mrs. Harrington to the effect that immediately after his injury, Mr. Harrington allegedly looked at her with great surprise upon his face and allegedly threw up his hands as he fell to the floor.

(m) That the District Court erred in admitting into evidence, over appropriate objection, the hearsay testimony of witness James F. Swinfard con-

cerning the opinions and conclusions of Mrs. Harrington allegedly expressed to him on the evening of February 5, 1960, including statements to the effect that Mr. Harrington had just shot himself, but that he didn't mean it.

(n) That the District Court erred in denying defendant's motion at the close of plaintiff's evidence to dismiss the action and enter judgment for defendant under the provisions of Rule 41 (b) of the Federal Rules of Civil Procedure upon the ground that upon the facts and the law plaintiff had shown no right to relief.

(o) That the evidence does not support the findings of the District Court.

(p) That the evidence and the findings do not support the conclusions of the District Court.

(q) That the evidence, the findings, and the conclusions do not support the judgment of the District Court.

Dated: June 13, 1961.

/s/ MORRIS M. DOYLE,

/s/ RICHARD MURRAY,

McCUTCHEN, DOYLE,

BROWN & ENERSEN,

Attorneys for Appellant New York Life Insurance
Company.

Certificate of Service by Mail attached.

[Endorsed]: Filed June 15, 1961.

[Title of Court of Appeals and Cause.]

STIPULATION

It is hereby stipulated, by and between the parties hereto, that none of the exhibits identified or introduced in evidence upon the trial of the action need be printed and that the court may consider those exhibits in their original form.

Dated: June 13, 1961.

MORRIS M. DOYLE,
RICHARD MURRAY,
McCUTCHEN, DOYLE,
BROWN & ENERSEN,
Attorneys for Appellant;

By /s/ RICHARD MURRAY.

ALLAN BROTSKY,
CHARLES W. DECKER,
Attorneys for Appellee.

By /s/ CHARLES W. DECKER.

So Ordered June 15, 1961.

/s/ RICHARD H. CHAMBERS,
Circuit Judge.

[Endorsed]: Filed June 15, 1961.

